84-1123 (1)

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No. _____

UNITED STATES SUPREME COURT
_____ TERM 1985

ARMOUR & COMPANY,

Petitioner,

vs.

CURTIS HOLSEY, JACKIE L. DRAKEFORD,
JULIUS FRAZIER, et al.,

Respondents.

PETITION FOR WRIT OF CERTIORARI

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COMES NOW your Petitioner, Armour & Company, by and through counsel, pursuant to 28 U.S.C.A. § 1254, and petitions this Court for a Writ of Certiorari to review a decision of the Court of Appeals for the Fourth Circuit dealing with class certification and the proper procedure to be followed in a bifurcated Title VII class action suit.

QUESTIONS PRESENTED FOR REVIEW

1. Did the Court of Appeals err in upholding the trial court's finding that the Title VII claims of plaintiffs and of intervenors Bennett, Hill and Harvey were meritorious at Stage I of the bifurcated trial, thus depriving defendant Armour of any opportunity to rebut these individual claims at Stage II?

2. Did the Court of Appeals err in unholding the trial court's class certification with respect to the following:

(A) Did the Court of Appeals err in affirming the trial court's class certification date, thus allowing intervenor Bennett, a temporary production employee, to represent a class of employees allegedly denied sales and supervisory positions?

(B) Did the Court of Appeals err in affirming the trial court's finding of sufficient numerosity for class treatment based not on the total number of openings during the relevant time period but rather on the number of black employees at the facility?

(C) Did the Court of Appeals err in affirming the trial court's finding that

plaintiffs' claims of harassment and retaliation were susceptible to class treatment?

Parties to this action: Armour & Company (Petitioner/Defendant); Curtis Holsey, Jackie L. Drakeford, Julius Frazier (Plaintiffs); Mynell Bennett, Linwood Edwards, Janie Hill, and Laura Harvey (Plaintiff-intervenors).

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On Petition for Writ of Certiorari from Holsey v. Armour & Co., No. C-C-77-57 (W.D.N.C. March 16, 1981), vacated and remanded, 683 F.2d 864 (4th Cir. 1982), as revised on remand, No. C-C-77-057-M (W.D.N.C. January 28, 1983), affirmed in part and reversed in part, 743 F.2d 199 (4th Cir. 1984), petition for rehearing denied, No. 83-1428 (4th Cir. October 15, 1984).

* *

STATEMENT OF THE GROUNDS ON WHICH JURISDICTION IS INVOKED

This is a Petition for Writ of Certiorari seeking review of the judgment of the Court of Appeals for the Fourth Circuit entered September 13, 1984, and from that Court's denial of this Petitioner's Petition for Rehearing on October 15, 1984. This Petition is brought pursuant to 28 U.S.C.A. § 1254(1).

STATUTES INVOLVED

This case involves the interpretation and application of 42 U.S.C. § 2000(e) et seq. (Title VII), 42 U.S.C. § 1981, and Rule 23 of the Federal Rules of Civil Procedure. Pertinent texts are set forth in the Appendix hereto.

STATEMENT OF THE CASE

On March 7, 1974, Curtis Holsey (Holsey), Jackie L. Drakeford (Drakeford) and Julius Frazier (Frazier) (plaintiffs) filed race discrimination charges with the EEOC against their employer, Armour & Company (Armour). On March 4, 1977, they instituted this action against Armour and the United Food and Commercial Workers International Union (Union), alleging that Armour and the Union had engaged in racially discriminatory employment practices affecting a broadly-defined class of individuals in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) et seq. (Title VII) and 42 U.S.C. § 1981. Shortly thereafter, the court allowed Mynell Bennett's motion to intervene; Bennett had filed a charge of discrimination with the EEOC on January 17, 1972. On May 1, 1979, the trial court conditionally certified an "across-the-board" class including all past

and present employees as well as all applicants for employment.

Armour, a major manufacturer of meat products, has operated a facility in Charlotte, North Carolina since 1958. By 1973 Armour's Charlotte facility had approximately 200 production employees. However, beginning in 1973 and continuing to the time of trial (April of 1980), economic conditions brought about major operational changes in the beef industry. One result of these changes was a severe reduction in employment at local facilities. The race discrimination claims brought against Armour in the case at bar arose in large part out of the displacement of workers occasioned by such operational changes. From January of 1973 until April of 1980, Armour's Charlotte facility did not hire a single production employee, and as of April of 1980, only 50 production employees were working at the Charlotte facility.

At trial, Holsey contended he was the victim of discrimination on permanent layoffs in September of 1974 and February of 1975; he did not contend that he was denied a supervisory, office, sales, or other position. Frazier alleged that he was discriminated against in a layoff in December, 1974. Drakeford contended that he was denied promotion to a foreman position, that he was constructively discharged, and that he was denied a job in the sales department. Bennett claimed that she was not called to work as a temporary replacement worker often enough to acquire seniority and was terminated. Janie Hill, who appeared as a non-party witness, testified that she did not acquire seniority as promptly as other probationary employees in the sausage department. Linwood Edwards, another non-party witness, testified that he was denied a supervisory position. Laura Harvey, also a non-party witness, testified that she was denied positions in sales, the

laboratory, the sausage department, and as switchboard operator. Another non-party witness also testified for plaintiffs during the course of the trial.

The claims against the Union were dismissed. On August 13, 1980, the trial court entered a Memorandum of Decision concluding that Armour had discriminated against the named plaintiffs. Important to the issues here presented, the trial court also held at that time that Armour had discriminated against three of the non-party witnesses, Edwards, Hill and Harvey. This same Memorandum of Decision directed plaintiffs' counsel to prepare proposed findings.

On November 13, 1980, plaintiffs filed their proposed findings, together with a motion for leave to intervene on behalf of these three witnesses. On February 9, 1981, almost one year after trial, the court allowed the motions to intervene and on that same date

entered an order adopting almost verbatim plaintiffs' proposed findings of fact and conclusions of law and judgment.

Armour gave notice of appeal, bringing forward numerous assignments of error with regard to the procedure used by the trial court in wholesalely adopting plaintiffs' proposed findings of facts and conclusions of law, and challenging the sufficiency of the evidence, the court's allocations of the various burdens of proof, class treatment of the harassment and retaliation claims, the court's finding of liability at Stage I with respect to the plaintiffs' three non-party witnesses, and the propriety of the class certification.

On appeal, the Court of Appeals for the Fourth Circuit vacated the judgment, on grounds that the trial court apparently misallocated the burden of proof by requiring Armour "to do more than 'articulate a legitimate, nondiscriminatory reason' for

their employment decisions." 683 F.2d at 866. In addition, the Court of Appeals criticized the trial court's wholesale adoption of plaintiffs' proposed findings of fact and conclusions of law. The case was remanded, with instructions to the trial court to reconsider its findings of fact and conclusions of law, and to clarify its allocation of evidentiary burdens in light of this Court's intervening decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981). 683 F.2d at 866. In light of its broad remand, the Court of Appeals did not in the first appeal reach Armour's other contentions of error. Id. After conducting proceedings on remand, the district court entered an amended judgment, from which Armour again appealed.

The Court of Appeals affirmed in part, vacated in part, and remanded, holding that the class as defined on remand was still too broad, in its inclusion of "office and

management positions," and that the class should be amended to include "only promotions into sales and supervisory positions." The Court of Appeals also held that there was insufficient evidence of a pattern or practice of racial discrimination against outside applicants to include a class of same. Id. The Court went on to hold, however, that the trial court did not err in adjudicating individual claims at the first stage of the bifurcated trial, that there was sufficient numerosity for class treatment of promotion claims, and that plaintiffs' harassment and retaliation claims were susceptible of class treatment. Id. Armour's subsequent Petition for Rehearing was denied.

ARGUMENT

THE COURT OF APPEALS UPHELD AN ERRONEOUS APPLICATION OF THE LAW IN HOLDING THAT THE CLAIMS OF PLAINTIFFS AND INTERVENORS WERE MERITORIOUS AT STAGE I OF THE TRIAL, THUS DEPRIVING ARMOUR OF ANY OPPORTUNITY TO REBUT THESE INDIVIDUAL CLAIMS AT STAGE II.

As noted above, the Court of Appeals approved the trial court's making a conclusive determination of liability at Stage I, not only with respect to the named plaintiffs, but also with respect to witnesses who were not even parties to the action at the time of trial. This ruling, when read in light of the Fourth Circuit's decision in Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978), creates a "double standard" for Title VII plaintiffs and defendants.

In Sledge, the Court of Appeals for the Fourth Circuit discussed the bifurcated approach used in the trial of Title VII class actions, noting that the first part of the

trial is the liability stage, during which the plaintiffs attempt to establish that the employer engaged in a pattern or practice of illegal discrimination. If the plaintiffs succeed, a second stage of trial is held, at which time the individuals are required to establish that they are members of the class and have suffered an individual economic loss as a result of the employer's discrimination. Id. at 637. As the court recognized, at Stage II of the litigation,

> [t]he burden then shifts to the employer to demonstrate . . . that factors other than the condemned discrimination caused the decision of which the particular back pay claimant complains, e.g., that with respect to the unsuccessful applicant there were no job openings or at least none for which he was qualified, or that with respect to the employee assigned to undesirable work no better jobs were vacant or at least for which he was qualified.

Id., citing inter alia Teamsters v. United States, 431 U.S. 324 (1977), Franks v. Bowman Transportation Co., 424 U.S. 747, 770-773 (1976); Albemarle Paper Co. v. Moody, 422 U.S.

405, at 413-22, 425 (1975); and McDonnell Douglas Corp. v. Green, 411 U.S. 792, 804 (1973).

The question addressed by the Court in Sledge is analogous to that presented here, as the Court in Sledge considered whether the trial court could conclusively make a finding of no liability with respect to a named plaintiff at Stage I. As the Court in Sledge described the procedure there used, "the decision to bar the claims of the named plaintiffs was reached after trial on the issue of the legality of [defendant's] conduct, but prior to the second stage of the bifurcated proceedings which had been expressly reserved for the evaluation of request for individual relief." Id. at 637. The court in Sledge specifically noted that because Stage I may result in a finding that there was no pattern or practice of discrimination, it would be "unfair to penalize any claimant--whether a named

plaintiff or not--for failing to affirmatively prove in the first stage of the inquiry that which he was led to believe he would be expected to prove only in the later, yet-to-be-held back pay proceeding." Id. at 638. The court noted that just because named plaintiffs appear as witnesses during the trial's initial phase, they should not be subjected to a more rigorous burden of proof. Id. See also Teamsters, supra, 431 U.S. 324 at 342 n.24 ("individual proof concerning each class member's specific injury was appropriately left to proceedings to determine individual relief").

The Fourth Circuit Court of Appeals also discussed the bifurcated trial procedure in EEOC v. Federal Reserve Bank of Richmond, 698 F.2d 633 (4th Cir. 1983). Said the court:

> [Plaintiffs'] argument would disregard the fact that the trial was bifurcated by agreement of the parties [as was the situation in the case at bar]. Accordingly, the first issue to be resolved in this case was that of liability for

> discrimination by the defendant. If liability were not found at this stage, the second stage, which would relate to establishing the individual claims of class members, such as these plaintiffs, would be mooted. However, specific evidence of individual acts of discrimination and promotion was relevant, but, under the practice in a bifurcated trial, it was not admitted to establish the class members' right to relief, but to provide support for the prima facie class claim of liability.

Id. at 674. (emphasis added)

If plaintiffs and others who testify need not conclusively establish their claims at Stage I, Armour logically and fairly should not be required to conclusively rebut individual claims until Stage II. It is respectfully submitted that the procedure which the Court of Appeals has approved for bifurcated trials through its decisions in Sledge and the present case has thrown out of balance the shifting burdens and responsibilities established by decisions of this Court including Aikens v. United States Postal Service Board of Governors, 460 U.S.

711, 31 F.E.P. Cases 609 (1983); Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Board of Trustees v. Sweeney, 439 U.S. 24 (1978); Furnco Construction Co. v. Waters, 438 U.S. 567 (1978); Teamsters v. United States, 431 U.S. 324 (1977); and McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

In the trial of an individual case, if the plaintiff establishes a prima facie case, the defendant must articulate a reasonable nondiscriminatory reason for its actions and finally the plaintiff may show pretext. In the trial of a bifurcated class action case, the issue of class discrimination follows the same pattern, i.e., plaintiff establishes a prima facie case of class discrimination, the defendant articulates a reasonable nondiscriminatory reason, and the plaintiff may show pretext. Under the Fourth Circuit's holdings, although an individual class member can conclusively prevail at Stage I, the

defendant employer cannot rebut an individual's claim at Stage I of the trial of a bifurcated class action case, giving the plaintiff or class member (but not the defendant) two opportunities to prove his case.

While Armour raises this issue as to both plaintiffs and intervenors, it is submitted that the Court of Appeals' holding is particularly inequitable as to intervenors Edwards, Hill, and Harvey. During the discovery process and the trial, the class in this action was defined as an across-the-board class covering all conceivable aspects of employment at Armour's Charlotte facility, including both employees and applicants. Armour could not have conducted discovery as to every potential class member's individual claims, even if these persons could somehow have been identified. Armour could not be prepared at Stage I of the trial to rebut claims of every potential class member. At

the trial non-party class members, including Edwards, Hill, and Harvey, testified. After the trial, but prior to any motion by these class members to intervene, the trial court filed its Memorandum of Decision conclusively finding that intervenors Edwards, Bennett, and Hill were individual victims of discrimination, leaving to Stage II only the computation of damages. The court's Memorandum of Decision is tantamount to a judgment in favor of a nonparty. It was not until six months after the Memorandum of Decision was filed that Edwards, Bennett, and Hill even moved to intervene. The fact that intervention was before entry of final judgment is of little significance in view of the Memorandum of Decision and the fact that, in accordance with Judge McMillan's standard procedure, it was plaintiffs' counsel who was directed to prepare the findings and judgment, which were subsequently adopted virtually verbatim.

That the above-described was the order of procedure ordered by the court is illustrated in the Order on Reference to a Master. Under the terms of this Order, the only issue at Stage II as to both the plaintiffs and intervenors is damages. With respect to other class members, the master is of course first to determine if the class member was denied a position because of race and then to make recommendations as to loss of income.

Although the specific question raised here has apparently not been addressed previously in any reported decisions, the procedure approved by the Fourth Circuit is clearly not in keeping with the bifurcated trial procedure used in the other circuits, is manifestly unfair to defendants in Title VII class action cases, and if allowed to stand would work an unwarranted burden on such defendants in an era in which this Court has worked to carefully delineate the proper use of class action procedure in the Title VII area.

THE COURT OF APPEALS INCORRECTLY UPHFLD THE TRIAL COURT'S CLASS CERTIFICATION.

(A) Plaintiff-Intervenor Bennett Cannot Serve As The Representative Of Employees Seeking Office, Sales And Foreman Positions.

As previously noted, the class in this case was originally certified as an "across the board" class including all present and future employees and applicants for employment at Armour's Charlotte facility. While this case was on appeal for the first time before the Fourth Circuit, this Court announced its decision in General Telephone Co. of the Southwest v. Falcon, 457 U.S. 147, 72 L. Ed.2d 740 (1982). On the initial remand, plaintiffs themselves put forward a suggested modification to the definition of the class, to limit the class to employees and applicants of Armour's Charlotte facility who were (1) "adversely affected . . . by the company's racially discriminatory employment practices

involving promotions or hiring into office and managerial positions, including sales and foreman positions" or employees who were allegedly subject to "retaliation for having opposed discriminatory practices or having exercised rights protected under Title VII." The class was so limited on remand. As approved by the Court of Appeals in the second appeal, the class was further limited to exclude all outside applicants and to include promotion claims only for sales and supervisory positions.

Armour submits that the class as presently constituted is nonetheless overly broad, in that the class includes individuals subjected to discriminatory treatment at any time since "July 27, 1971 (six months prior to Bennett's charge filed with the EEOC)." 743 F.2d at 213. In using Bennett's EEOC charge as the basis for the class certification date as to all claims, the Court allowed Bennett, a temporary production worker, to represent

employees aspiring to promotions in sales and supervisory positions.

The trial court found in the case at bar that Drakeford and Harvey were denied sales positions; that Drakeford and Edwards were denied supervisory positions; and that Holsey, Frazier, Drakeford, and Bennett were victims of retaliation. Drakeford alone fits into each of the distinct areas of class certification (i.e., sales, supervisors, and retaliation). The Court of Appeals in its decision in the second appeal stated that "at least one representative is a qualified member of the class of employees denied promotions in sales and supervisory positions and subjected to retaliation." 743 F.2d at 217. That one representative can only be Drakeford.

Armour respectfully submits that the Court of Appeals erred in basing the class certification date on Bennett's charge of discrimination. As previously noted, Bennett's charge was filed more than two years prior to

that of Drakeford, Holsey, and Frazier. With the exception of the original plaintiffs and Bennett, no other charges of discrimination existed. The class as certified allows Bennett to represent a class of employees allegedly denied sales and supervisory positions, a practice specifically disallowed by this Court.

It is obvious under Falcon that Bennett cannot represent a class of aspiring salespersons or supervisors. The evidence at trial was undisputed that Bennett worked as a temporary replacement worker in the sausage department from July of 1971 through January of 1972. During Bennett's employment of six months she worked only 45 1/2 days. After January of 1972, Bennett was never recalled to work. Bennett was never denied a supervisory or sales position. The Court of Appeals' allowance of Bennett as a class representative of the sales and supervisory class is clearly inconsistent with General Telephone Company of

the Southwest v. Falcon, 457 U.S. 147 (1982), and East Texas Motor Freight v. Rodriquez, 431 U.S. 395 (1977). In fact, Bennett's race is the only common denominator between herself and any class member seeking supervisory and sales positions.

Even assuming arguendo that Bennett's charge could be used as a basis for the class certification date, it can only be so used for a subclass of alleged victims of retaliation, thus creating two subclasses, one subclass for employees denied sales and supervisory positions, and the second subclass for employees allegedly victims of retaliation. The law is clear that each subclass must separately meet the requirements of Rule 23. See Betts v. Reliable Collection Agency, Ltd., 659 F.2d 1000 (9th Cir. 1981).

(B) The Lower Courts Erred In Their Approach To Determining Whether Rule 23's Numerosity Requirement Was Met.

Rule 23(a)(1) provides that "a member of a class" may sue on behalf of the class only if "the class is so numerous that joinder of all members is impracticable." While there is no automatic number for determination of numerosity, this Court in General Telephone Company of the Northwest, Inc. v. EEOC, 446 U.S. 318, 330 n.14 (1980), cited with approval cases holding as many as 35 to 45 individuals too few for class treatment. As noted by Schlei and Grossman, "[c]ourts have generally been reluctant to certify a class with fewer than 45 members". B. Schlei & P. Grossman, Employment Discrimination Law at 1242 (2d ed. 1983).

The numerosity requirement clearly has not been met in the case at bar. The total of all foreman positions and sales positions during the relevant time period (even using Bennett's charge as the basis for the class certification date) numbered only 34 according to plaintiffs' own evidence. Considering

plaintiffs' most liberal availability figures (approximately three to five times SMSA data), at the very most plaintiffs' evidence shows that six or seven positions would have been awarded to blacks during the relevant time frame.

Although the Court of Appeals below stated that its holding was not in conflict with its prior decision in Kelley v. Norfolk & Western Ry., 584 F.2d 34 (4th Cir. 1978), the very language quoted from Kelley by that Court indicates otherwise:

> Kelley establishes that there is no mechanical test for numerosity and the determination "turns on the nature of the claim of discrimination asserted by the plaintiffs and the number of persons who could have been injured by such discrimination."

743 F.2d at 217, quoting 584 F.2d at 35 (emphasis added). That the Court in Kelly saw the number of openings as equivalent to "the number of persons who could have been injured" is illustrated by the following:

> Moreover, in the relevant period, there were only 25 promotions to gang-leader or foreman. It could be argued persuasively that the appropriate class could not exceed 25 since that was the maximum number of promotion openings for which black car-repairmen could have competed. Perhaps an argument that the appropriate class should be confined to those eight the plaintiffs identify to have been qualified for consideration for promotion. It might be that under some theory, the appropriate class would embrace all the black car-repairmen, irrespective of qualification for promotion, though we have difficulty in finding a basis for such a result.

584 F.2d at 35. By the same analogy, the class in this case can consist of 34 persons at the very most. More realistically, numerosity exists only as to the six or seven positions which, by plaintiffs' evidence, is the outside limit on the number of positions that could have gone to blacks. In either event, numerosity does not exist.

If the date that Holsey, Drakeford and Frazier filed the charge of discrimination (March 7, 1974) is used as the basis for class certification as opposed to the date Bennett

filed her charge of discrimination (January 17, 1972), the absence of numerosity becomes even more apparent. Beginning with September 7, 1973 (six months before the date Holsey, Drakeford, and Frazier filed their charges of discrimination), the total of all foremen and sales positions was only 17. It is respectfully submitted that the Court of Appeals' ruling as to numerosity is in clear conflict with the holdings of this Court and other Circuits, and in effect would render subject to class treatment an isolated employment decision (e.g., promotion) simply because a large number of employees within the protected group were employed at the facility.

THE COURT OF APPEALS ERRED IN HOLDING THAT PLAINTIFFS' HARASSMENT AND RETALIATION CLAIMS WERE SUSCEPTIBLE TO CLASS TREATMENT.

The Court of Appeals rejected Armour's contention that the harassment and retaliation claims were too individualized to be

susceptible to class treatment. The Court recognized that these claims involved "individual factual questions," but held that Rule 23's commonality requirement was met because these claims involved "common questions of law." 743 F.2d at 217. It is clear, however, that because these claims are so individualized, the claims and defenses of the plaintiffs were not "typical of the claims or defenses of the class" as required by subsection (a)(3) of Rule 23. The Court of Appeals adopted a standard in conflict with that set forth by this Court in East Texas Motor Freight Systems, Inc. v. Rodriquez, 431 U.S. 395, 405-06 (1977), that all of the requirements of Rule 23 must be met.

The Fourth Circuit in this case has also clearly adopted a position contrary to that applied by the Seventh Circuit in Patterson v. General Motors Corporation, 631 F.2d 476 (7th Cir. 1980). There the Court examined plaintiff's allegations that the employer inter

alia maintained an essentially all-white department, failed to promote plaintiff, and harassed plaintiff for seeking redress of grievances by terminating him, forcing him to return prematurely from medical leave, and falsely accusing him of violation of work rules, id. at 479, and held that

> even if the plaintiff were to specify grievances of other members of the purported class, the acts for which plaintiff complains are not susceptible to class treatment."

Id. at 481 (emphasis added). As the Court went on to point out,

> A certifiable class claim must arise out of the same legal or remedial theory, see Donaldson, supra, 554 F.2d at 831, and grievances of other employees similar to those asserted by plaintiff would not meet that requirement.

Id. (emphasis added).

The claims of harassment and retaliation raised by plaintiffs in the case at bar are strikingly similar to those raised by plaintiff

in Patterson, especially with regard to their individualized nature. Plaintiffs here had different supervisors and complained of different types of harassment and retaliation. It seems clear the such claims were never intended to be covered under Rule 23, and the Fourth Circuit's treatment of the claims represents a serious departure from established class action procedures.

CONCLUSION

In light of the authorities cited above and argument contained herein, it is respectfully submitted that Armour's Petition for Writ of Certiorari should be granted.

WHEREFORE, your petitioner Armour and Company, through its undersigned counsel, hereby petitions that a Writ of Certiorari issue.

This the 10th day of January, 1985.

W. R. Loftis, Jr.

Penni L. Pearson

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CERTIFICATE OF SERVICE

I, Penni L. Pearson, hereby certify that on this date, I served copy of the foregoing Petition for Writ of Certiorari upon counsel of record for Petitioner by depositing copy thereof in the United States mail in Winston-Salem, North Carolina, postage prepaid, and addressed as follows:

Jonathan Wallas, Esquire
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Adkins, P.A.
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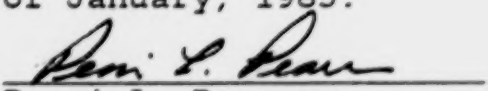
This the 14th day of January, 1985.



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ARMOUR & COMPANY,

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE

UNITED STATES DISTRICT COURT

FOR THE

WESTERN DISTRICT OF NORTH CAROLINA

CHARLOTTE DIVISION

CURTIS HOLSEY, et al., Plaintiffs, and MYNELL BENNETT, Intervening Plaintiff, v. ARMOUR AND COMPANY, et al., Defendants.	)	CIVIL ACTION NO. C-C-77-57

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Plaintiffs Curtis Holsey, Jackie L. Drakeford and Julius Frazier filed this action on March 4, 1977. They alleged that they and other black employees of and applicants for employment with defendant Armour and Company

(hereinafter referred to as the "Company") were discriminated against and denied equal employment opportunities because of their race and color. The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and its Local 525[1] (the Union) were also named as defendants.

The practices of the Company and Union were alleged to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. §1981. Jurisdiction of the Court was invoked pursuant to Title VII, 42 U.S.C. §2000e-5(f)(3), 28 U.S.C. §1343 and 28 U.S.C. §1331.

Plaintiffs prayed that the proceeding be certified as a class action pursuant to Rule 23(b)(2) consisting of all past, present and future black employees and applicants for employment who have been, or may in the future, be denied employment opportunities by defendants because of race and color.

Holsey, Frazier and Drakeford filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) on March 7, 1974. Following a cause determination, EEOC, on January 8, 1977, issued right-to-sue letters and this proceeding followed within the 90-day period permitted by Title VII.

Mynell Bennett was allowed to intervene in the proceeding as a plaintiff on June 2, 1977. Bennett had previously filed a charge with EEOC on January 27, 1972, alleging that she had been denied employment and an opportunity to establish permanent employment status because of her race. She also alleged that the defendants maintained racially separate jobs and job classifications. Following a cause determination by EEOC, Bennett obtained a right-to-sue letter and timely moved for leave to intervene.

After reviewing the pleadings, the pre-trial discovery evidence, affidavits,

briefs and arguments of the parties, the Court, on May 1, 1978, conditionally certified this action as a class action and defined the class, with respect to the Company, as:

> All black applicants for employment and all present and former black employees at . . . [the Company's] Mecklenburg County, North Carolina, facility, who were employed or sought employment at any time since July 27, 1971, in maintenance and production, and in sales, clerical and salaried positions, and who may have been or may be affected by the discriminatory practices alleged in the complaint, . . . However, no class certified as to the defendant unions should include either applicants for non-production jobs or non-production employees, since (a) the unions have no representational capacity with respect to such individuals, and (b) named plaintiffs assert claims against the unions only in their capacity as representatives of production employees.[2]

Notice of the pendency of the action was served on all class members as defined.

Defendants have denied plaintiffs' material allegations and have submitted various procedural and substantive motions.[3]

Trial hearings were held on March 27, 28,

31 and April 1 - 4, 1980. Based on the evidence received and the briefs and arguments of counsel, the Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Company has operated a meat processing facility in Mecklenburg County at its present location since 1958. It prepares meat products for sale and distribution to retail and wholesale outlets in North Carolina, South Carolina, Tennessee and Georgia. (Plaintiffs' Exhibit 42, pp. 12-13 and Exhibit 43, p. 2)

2. The production operation of the Company is divided into four departments:

Operation - shipping, receiving, storage and transportation

Beef - preparation of beef products

Sausage - preparation of sausage

Maintenance - repairs and maintenance of

vehicles, plant and facilities.

Additionally, the Company has maintained an Office for accounting, data processing, sales, laboratory research and various clerical functions. (Plaintiffs' Exhibits 23 and 45)

3. Hourly paid, production employees have been represented by the Union since 1957. (Plaintiffs' Exhibit 42, pp. 13-14 and Exhibits 22a - 22f) The Union has no authority or responsibility with respect to Office employees, supervisors or managers or hourly paid employees pending completion of their probationary period.

4. Defendants have established departmental seniority for production employees to govern job progression, promotion, layoff and recall. Company or date of hire seniority governs vacations, pension or retirement benefits, sick leave and other fringe benefits. (Plaintiffs' Exhibits 22a - 22f)

5. Plaintiffs Holsey, Frazier and Drakeford were initially hired by the Company in production. Holsey was hired on December 1, 1969; Frazier on July 21, 1969; and Drakeford on June 17, 1969.

6. In their applications for employment, only Holsey and Frazier indicated a specific job to which they would like to be assigned, Holsey for warehouse shipping and Frazier for meat cutter or truck driver. All three, however, were initially assigned to Operations as laborers or lugger-loaders. (Plaintiffs' Exhibits 15-17)

7. At the time of plaintiffs' initial employment, black employees were basically assigned to Operations. One or two black employees were in Beef; no black male was in Sausage. There was and never had been a black supervisor or salesman or a black employee in the Office except in a laborer's position. (Plaintiffs' Exhibit 42, pp. 26-28; Exhibit 24; Answer to Interrogatory 6; Exhibit 25;

Answer to Interrogatory 1)

8. Shortly after their initial employment, plaintiffs were reassigned to the Beef Department and worked there on a continuous basis until lay-offs began in 1973 and 1974.

9. Between 1969 and 1973, the Company experienced a growth in sales and increased its work force from approximately 90 to over 200 employees. Since 1974, its production work force has decreased to approximately 133 at the time of trial, approximately 50 of whom worked regularly. (Trial Transcript pp. 125-128)

10. With the decrease in sales, the Company began to lay off its production employees in Beef and subsequently in Sausage and Operations. Employees were laid off pursuant to their departmental seniority with the employee with the least departmental seniority being the first to be laid off. However, employees with 5 years or more

seniority were allowed to use their Company or date of hire seniority to bump junior employees in other departments. Thus, Beef employees with 5 or more years of Company or date of hire seniority were allowed to bump junior employees in Sausage or Operations. Highly skilled or trained employees in Maintenance were not subject to this bumping provision pursuant to a side or supplemental agreement between the Company and Union in 1971. The 1976 Collective Bargaining Agreement reduced the 5 or more year requirement for bumping across departments to 1 year. (Trial Transcript, pp. 28-82, 98-113 and Exhibits 20A - 20H, 22A - 22F and 23)

11. Despite the cutback on production employees in 1974, the Company continued to hire and to promote employees into supervisory and managerial positions, into Sales and into various Office positions. (Plaintiffs' Exhibits 20, 21, 29, 31, 81a, 83, 84; Defendant Company's Exhibit 12)

12. The Company has not established any definite criteria for hiring employees in production jobs whether hourly paid or supervisory. The Company preferred high school graduates but this was not a requirement. Rather, hourly paid employees were provided a "reasonable" period within which they were trained or respective jobs. No established period was set for on-the-job training.

This same procedure was followed for supervisors in production. No educational requirement was established. Officers of the Company subjectively selected the employee or applicant they deemed best qualified and would provide on-the-job training for the employee selected. (Plaintiffs' Exhibit 23; Trial Transcript pp. 77-82, 261)

13. No objective criteria was established by the Company for Office employees, including sales. Officers of the Company tried to determine the best qualified

applicant and employee, transferring some production employees into sales and managerial positions. (Trial Transcript, pp. 203, 228-229)

14. Prior to the filing of this action, no black employee or applicant had been selected for a supervisory or managerial position or for sales. Applicants for employment and employees were selected for these positions by an all-white managerial and supervisory staff, pursuant to the subjective standards indicated above. (Plaintiffs' Exhibit 42, pp. 27-28, Trial Transcript, pp. 90-98, 171-179, 202, 214-215, 229, 249)

Individual Discriminatory Practices

15. Following plaintiff Holsey's transfer to Beef, he attempted to bid on better job positions in Beef but was discouraged by his supervisor. His supervisor discouraged him from bidding on promotion to

beef boner and primal cut (beef breakdown), suggesting that he would not like the position. He submitted a bid anyway and was promoted. He was thereafter harassed by being assigned additional job duties which white employees did not have to perform, was improperly disciplined and was denied assistance in training and in the performance of his job. Plaintiff Holsey filed numerous grievances about the harassment, several of which were subsequently adjusted by the Company. For example, the Company increased his pay by 45 cents per hour and provided a four hour daily guarantee following a grievance on August 19, 1974; he was compensated for 2 days on October 21 and 22, 1974, and for 1 day in February 1976, because of the Company's refusal to recall him from lay-off. The Company refused to allow him to grieve that he was being discriminated against because of race in 1974 and referred him to the EEOC.[4] (Trial Transcript, pp. 293-304,

357-365; Plaintiffs' Exhibit 14; Union's Exhibits 1-15)

16. Plaintiff Holsey attempted to exercise his Company or date of hire seniority in 1974 and subsequently, in order to avoid his lay-off in Beef. He attempted to bump into Sausage, a predominantly white department, but was denied this opportunity. (Trial Transcript., pp. 309-327, 688, 701-720, 794)

17. Pursuant to Section 15.7 of the Collective Bargaining Agreement, the Company provided opportunities for Beef employees on September 2, 1974, February 26, 1975 and February 24, 1976 to use their Company or date of hire seniority to bump junior employees in other departments. Senior employees were also allowed to bump in the interim. Although establishing 5 years seniority on December 1, 1974, plaintiff Holsey was not allowed to bump junior white employees in Sausage. He was advised that no employees junior to him were

working fulltime in Sausage and that he could only bump junior employees in Operations. (Trial Transcript, pp. 309-327, 688, 700-720, 784-794, 832-833; Plaintiffs' Exhibits 20A-20J)

18. The Company suggests* with respect to each bumping in 1974, 1975 and 1976, that senior employees could only bump a junior employee who was not on lay-off. According to the Company, work contingents for succeeding weeks were established on Wednesday of each week. For example, if 10 employees were needed in Beef, the 10 most senior employees were selected to work. The junior employees were placed on lay-off for the week and would be recalled in Beef based on their departmental seniority. They would not be recalled to other departments unless employees with departmental seniority in those departments were not available for work. In that event, employees on lay-off would be recalled based on their Company or date of

hire seniority. If the laid-off Beef employee chose, he could bump a junior employee in Sausage or Operations and establish seniority in Sausage or Operations. The former Beef employee would thereafter have no recall rights to Beef but would have temporary and permanent recall rights in the new department to which he or she was assigned. (Trial Transcript, pp. 688-770, 784-785; Plaintiffs' Exhibits 22A - 22F)

19. The Company has failed to offer any reliable evidence[5] that Sausage employees junior to Holsey were on lay-off and not subject to the bumping provisions of the Collective Bargaining Agreement. During the period in question, plaintiff Holsey was on lay-off 219 days. However, at least 4 Sausage employees, who were junior in seniority to Holsey, Bertha Cox (laid off 107 days), Dixie S. Wright (laid off 132 days), Joseph P. Newman (laid off 70 days) and Ulysses Phifer, Jr. (laid off 82 days), were allowed to work

during Holsey's lay-off.[6] The Company offered no credible evidence that these employees were "temporary replacements" within the meaning of Appendix I to the contract.[7] Thus, although Holsey had 5 years company or hire date seniority, he was not allowed to exercise his seniority on lay-offs in 1974, 1975 and 1976 to bump junior employees in Sausage.[8]

20. Holsey did not express an interest in a supervisory position or in Sales. He was not considered for either position although vacancies occurred during his employment. (Trial Transcript, pp. 347-348; Defendant Company's Exhibit 12)

21. Plaintiff Frazier similarly attempted to exercise his Company seniority after July 21, 1974, 5 years after the date of his employment, but was unable to do so. Like Holsey, Frazier was not allowed to bump into Sausage. He was limited to Operations and was unable to work in December, 1974, while junior white employees were allowed to work in

Sausage. (Trial Transcript, pp. 434-439)

Additionally, Frazier was interested in a supervisory position but was never selected. Defendant suggested that Frazier lacked aggressiveness but offered no reliable evidence of how Frazier's lack of aggressiveness was to be measured with the number of junior white employees who promoted over him to supervisory positions. (Trial Transcript, pp. 439, 760-768, 770-778, 824-829)

22. Plaintiff Drakeford began efforts shortly after his employment to promote to a supervisory position. He talked with his supervisor and the manager of his Department about his interest, but junior white employees were selected over him. Defendant offered no reliable[9] evidence to establish that the employees selected were more qualified or even equally as qualified as Drakeford. For example, Roof, a junior white employee was selected over Drakeford in July 1973. Roof

has less experience than Drakeford in the department, had no greater educational background and was demoted within 5 months because of his inability to perform supervisory responsibilities. (Trial Transcript, pp. 401-406, 408, 409, 747-777, 821-828)

Beginning in 1971, the Company instituted a trainee program for supervisors, limiting its consideration of applicants to college graduates. The following employees were selected between 1971 and the termination of the program in 1975:

C.E. Adams - hired 11-9-70; transferred to Sales in 7/72;

F.J. Bowden - hired 3-12-73; transferred to purchasing clerk's job in Office and subsequently resigned;

M.G. Brown - hired 7-30-73; discharged 11-30-74;

R.B. Clark - hired 11-7-71; discharged in

1974;

T.M. Harris - hired 1-7-74; discharged 12-14-74;

S.A. Long - hired 1-11-73; resigned 2-24-73;

J.H. Ortwein - hired 4-16-74; transferred to Company's Memphis facility on 11-4-71;

N.H. Thuemmel - hired 1-14-74; discharged 12-14-74.

(Company's Exhibit 12; Plaintiffs' Exhibits 29, 31 and 84; Trial Transcript, pp. 760-766) No black employee or applicant was selected for the program.

The Company made no effort to validate the criteria used in the selection of trainees and terminated the program after it was clear that the selection criteria were invalid. The candidates selected either terminated their employment before permanent assignment or shortly thereafter or were assigned to more challenging and income producing employment in

Sales or management. All of the 8 trainees left the Company except Adams and Ortwein. Adams was transferred to Sales and Ortwein to the Company's Memphis, Tennessee facility. (Trial Transcript, pp. 747-777, 820-828)

23. Between 1970 and January 1977, 19 employees were hired as supervisors; 7 promoted from within; 9 were hired as new employees, and 3 employees were transferred into foremen positions from other facilities. One of the 19 was employed from a closed competitor. No black was selected as a foreman during this period, although black employees constituted 25.11 percent of the Company's work force and several, including Drakeford, had expressed an interest in a foreman's position. Black candidates also constituted 14.66 percent of the outside available work force. By combining the internal and external availability, one would expect 8.25 percent black foremen as of January 1, 1977. No black, however, had been

assigned as a foreman. (Trial Transcript, pp. 540-570; Plaintiffs' Exhibits 81a - 81d)

24. Drakeford has a high school diploma (GED), one year of business training at Evans Business College in Charlotte and one and one-half years of mechanical training at Central Piedmont Community College in Charlotte. Additionally, he has worked for the Company in Operations, Beef and temporarily in Sausage. His performance evaluation was high. He was familiar with the Company products and operations and was qualified to perform the supervisor's responsibilities. He was passed over, between July 1973 and his promotion on February 28, 1977, on more than 8 occasions by junior white employees[10] with less training and experience. During this period the Company had no black supervisor. (Plaintiffs' Exhibit 15; Trial Transcript, pp. 160-162, 403, 408, 766-777, 821-828)

25. Drakeford was selected as a

supervisor on February 28, 1977, after the filing of his charge and 4 days before the filing of this action. He has not been compensated for any loss of income as a supervisor up until his February 28, 1977 promotion. Drakeford was the first black to be hired as a supervisor.

26. Following his promotion to supervisor, Drakeford was not assigned all supervisory responsibilities. The General Foreman, Melvin Potts, would grant leave to employees supervised by Drakeford without advising him. His day shift was assigned to a white supervisor.[11] Drakeford was put on a night shift beginning at 7:00 p.m. That shift was further altered, with Drakeford assigned to come in at 4:00 p.m. in order to accommodate another white supervisor. Drakeford was denied assistance which the Company provided other supervisors.[12] (Trial Transcript, pp. 405-407, 416, 751-753, 837)

27. Drakeford complained to his

superiors about the difference in treatment and harassment to which he was subjected but was accorded no relief. He requested a transfer but the request was rejected. Not being able to obtain relief and being subjected to degrading treatment, he left the Company's employ on November 28, 1978, but would like to return if assigned the supervisor's responsibilities, free of discrimination and harassment. (Trial Transcript, pp. 405-407, 751-753, 837)

28. Drakeford also requested employment as a salesman. He talked with the Sales Manager in 1975 and requested a sales position. He was advised that he would be considered for the next vacancy. (Trial Transcript, pp. 403-409)

29. No black employee or applicant had been hired as a salesman until after the filing of this action. Between 1971 and February 1977, the Company hired 15 salesmen, 2 from within the work force and 13 from

outside.[13] Production employees had also been transferred in or hired as salesmen. (Trial Transcript, pp. 540-570; Plaintiffs' Exhibit 81a-81d)

30. The Company has no written standards for selecting salesmen. Generally, the Company states that it looks for a high school graduate; a person who is honest, ambitious, neat in appearance, trustworthy, with a good personality and generally good all around. Selection of applicants is made by the Sales Manager with the Plant Manager making the final determination. Other managers and officials may have input. The determination, however, is by an all-white staff and based on the subjective standards indicated. (Trial Transcript, pp. 164, 171-177, 203-224, 229-255)

31. Applicants may submit applications for sales positions at any time during the business day or may complete applications after being selected. Drakeford was not

requested to complete an application and despite the assurance of the Sales Manager, Drakeford was never considered.

32. Blacks constitute 8.69 percent of the external available work force and 20.71 percent of the internal work force for sales positions.[14] The first black, Ennis Graves, was hired in sales on August 1, 1977. He resigned April 15, 1978. Virginia Davis, a black female employee, was employed as a sales clerk on December 27, 1976. Ms. Davis, however, did not have sales responsibilities. She terminated her employment on February 12, 1977. Thus, at the time of trial, no black among the approximate 32 employees were employed in sales. (Trial Transcript, pp. 210, 229; Plaintiffs' Exhibit 83)

33. Several black applicants and employees had requested assignment to sales. In addition to outside applicants and Drakeford, Thomas Brown, Dennis Williams, Henry Croutch and Laura E. Harvey requested

employment as a salesperson between 1975 and 1978. Defendant offered no evidence for the failure to employ either of these black applicants or other black applicants who applied during this period although vacancies existed and, with the exception of Graves, only white applicants were hired to fill the vacancies. (Trial Transcript, pp. 208, 214-215, 233, 244, 454, 468-484, 779-780)

34. Salesmen may be required to live and work in areas outside of Charlotte because of the territory served by the Company. Drakeford advised the Sales Manager that he was willing to locate in other areas. Drakeford was also experienced in and knowledgeable about the Company's products and operations, was honest, neat in appearance, able to communicate and was, under the criteria suggested by the Company, able to perform the duties as a salesperson. The same is true of Laura Harvey and there is no evidence that the other applicants identified

at trial were unqualified. (Trial Transcript, pp. 403-404, 468-484)

35. Linwood Edwards was initially employed by the Company in 1949 in Asheville, North Carolina. While at Asheville, he promoted to a supervisory position. (Trial Transcript, pp. 184-189)

36. Although Asheville was nonunionized, Edwards was experienced as a supervisor and was knowledgeable of defendant's operation and procedure. (Trial Transcript, pp. 184-189, 278-282)

37. The Asheville facility was closed in 1969 and Edwards was transferred to Mecklenburg County. Defendant's previous practice, which continued throughout the period of trial, was to transfer employees from closed facilities to others in basically the same job positions they occupied in the closed facility. For example, J. E. Davis and G. E. McClellan were transferred into Mecklenburg County as supervisors from closed

facilities. W. F. Myers was also transferred into the Mecklenburg facility as a supervisor from a closed facility. Edwards, however, was denied a supervisory position and assigned as a laborer (lugger loader). As indicated, the Company had no black supervisor until Drakeford's assignment in 1977, following his charge filed with EEOC. (Trial Transcript, pp. 184-189; Defendant Company's Exhibit 12)

38. After his transfer, Edwards requested promotion to or assignment as a supervisor. Although junior white employees were hired as and promoted to supervisory positions after Edwards' transfer, Edwards was denied assignment as a supervisor.

39. Edwards was qualified to be assigned as supervisor at the Company's facility. He was qualified to fill the position upon his transfer in 1969 as well as at the time of the vacancies occurring between 1971 and the time of trial. (Trial Transcript, pp. 282-283, 821-824)

40. Mynell Bennett, a black female, sought employment with the Company on July 16, 1971. She did not indicate a specific job position but was assigned to a job limited to women employees in the Sausage Department.[15] (Plaintiffs' Exhibit 18)

41. Under the Collective Bargaining Agreement then in effect, one had to work 30 days during a consecutive 60-day period in order to establish permanent status. One was classified as a probationary or temporary employee until establishing permanent status. (Plaintiffs' Exhibit 22a)

42. Probationary employees were called to work weekly or daily by their supervisor as needed. No standards had been established by the Company to govern the supervisor's discretion in calling probationary employees for work. (Trial Transcript, pp. 374-380, 662-674)

43. Ms. Bennett performed her job effectively and proficiently when called. In

August, 1971, the Company hired several white women[16] from the closed Swift & Company facility in Mecklenburg County. Although the former Swift employees were junior to Bennett and were also probationary, the former Swift employees were called in over Bennett. (Trial Transcript, pp. 374-380)

44. The Company also employed white high school students to work during the summer months. These students were also called to work over Bennett. (Trial Transcript, p. 379)

45. Bennett was unable to establish permanent status and seniority and, therefore, inquired in January, 1972, if the Company was refusing to call her because of her race or because of her work performance. She was assured that her work performance was acceptable and was later advised that she was being discharged. The Company offered no explanation for the termination of Bennett's employment. (Trial Transcript, pp. 379-380, 666-670)

46. The former white Swift employees established seniority in December, 1971. Bennett was never allowed to establish seniority although she was senior in date of hire to the former Swift employees.

47. Janie Hill, a black female, was employed by the Company on June 3, 1971. Hill was assigned to a female job in Sausage. Like Bennett, Hill was denied employment while junior white, former Swift employees and high school students were allowed to work and to establish seniority. Janie Hill was unable to establish seniority until March 1972. (Plaintiffs' Exhibit 69; Trial Transcript, pp. 389-395)

48. Junior white employees who were allowed to establish seniority over Hill included Sandra McAllister, Ann Long, Ruth English, Peggy Hicks and L. Purell.

49. Hill had also performed her job proficiently with no complaint about her work or explanation by the Company for allowing

junior white employees to work over her.

50. Defendant has offered no credible evidence that the junior white employees were able to perform the job responsibilities more proficiently or effectively than Bennett or Hill. In fact, the evidence demonstrates that Bennett and Hill were equally or more proficient or more entitled to preference because of their date of employment and performance ratings.

51. Bennett and Hill lost wages because of the Company's refusal to allow them to work and to establish seniority while junior white employees were allowed to do so.

52. Laura E. Harvey was employed by the Company on January 8, 1973, as a keypunch operator. Harvey was the first black in the Office. In 1979, she promoted to lead keypunch operator, a supervisory position, replacing a former white employee. Harvey, however, was not allowed to supervise the 2 white employees under her supervision. She

supervised 2 black employees; the white employees were supervised by the manager of Harvey's department because they did not wish to be supervised by a black person. Harvey complained and quit in March, 1979, but was re-employed in May, 1979, again as a lead keypunch operator but without supervisory duties. (Trial Transcript, pp. 462-484)

53. Between 1975 and the date of trial, Harvey applied for the following job positions: sales in 1976, 1977 and 1978; laboratory assistant in 1977; switchboard in 1976; and for a production job in Sausage in 1976. She was denied a sales position and a transfer to Sausage. A black employee was hired over her in the laboratory. She was advised that she would be trained on the switchboard but denied training until 2 weeks prior to trial. She was also required to work overtime after complaining about the Company's racial practices, more than other employees. (Trial Transcript, pp. 462-484; 780-784)

54. The Company offered no explanation for failing to allow Harvey to supervise the white employees in keypunching, for failing to hire or to transfer her into sales, for failing to train her on the switchboard or for requiring her to work overtime more than other employees.

55. As indicated, Harvey was qualified to work as a salesperson, to supervise keypunch employees and to operate the switchboard. Although the Company had vacancies in these positions, it offered no evidence to explain why Harvey was not selected.

Findings with respect to the class

56. Prior to 1965, the Company limited the employment and promotional opportunities of black applicants for employment and black employees to the warehouse (Operations) as laborers. After the effective date of Title

VII (July 2, 1965), a limited number of black employees were allowed to transfer into Beef and into Sausage. Holsey, Frazier and Drakeford were transferred into Beef in 1969 and 1970. (Trial Transcript, pp. 84-98, 160-166, 171, 202, 231-233, 293-298, 374-382, 389-395, 434-437, 450-454, 462-469; Plaintiffs' Exhibit 24, Answer to Interrogatory 6)

57. The first black women were hired in Sausage in 1969. (Trial Transcript, pp. 374-380, 389-395; Plaintiffs' Exhibits 20, 28a and 28b)

58. Prior to the charges filed by Holsey, Frazier and Drakeford in 1974, no black worked as a supervisor or in management. Harvey was the first black hired in the office in other than a janitorial position. (Trial Transcript, pp. 462-463) The Company filled these job positions by transfer, promotion or hiring of incumbent employees or by hiring new employees. Incumbent employees who were

interested in these positions were required, like applicants for employment, to fill out an application for employment. Incumbent employees who sought supervisory, managerial and office positions, including sales, were, therefore, like new applicants since they were given no preference over others; nor were they accorded any special status after employment in such positions which were not given to new hires. (Trial Transcript, pp. 37-38; 229, 249; Plaintiffs' Exhibit 16)

59. Between 1965 and the date of Drakeford's promotion to supervisor on February 28, 1977, the Company employed 37 supervisors. Twenty-seven were promoted from within; 10 were new hires. Two were transferred from closed Company facilities located outside of Mecklenburg County. One was hired from a closed facility of a competitor. (Trial Transcript, pp. 474-477, 820-828; Plaintiffs' Exhibits 21, 81a, 83 and 84)

60. During this period, black employees constituted 25.11 percent of the Company's internal available candidates and 14.66 percent of the outside available job market. No black was hired. (Trial Transcript, pp. 540-570; Plaintiffs' Exhibits 81a, 84)

61. Between 1971 and Drakeford's promotion in 1977, the Company hired or promoted 19 employees to supervisory positions. Again, no black was employed.

62. The hiring sample of supervisors during the period 1971 until 1977 is not large enough to establish a reliable statistical pattern.[17] Defendant's practices from 1965 through 1977, however, demonstrate a total exclusion of black applicants and employees from the rank of supervisor although qualified applicants and employees were available for such positions. Additionally, Linwood Edwards was not allowed to transfer into the Company facilities on the same conditions as white supervisors from closed facilities. (Trial

Transcript, pp. 184-189, 540-570)

63. The number of black applicants and employees who have been adversely affected by the Company's practice with respect to supervisors is not known. The practice was sufficiently pervasive and widely known to affect all black employees of the Company and qualified blacks in the relevant job market to make them too numerous for joinder in this proceeding. Additionally, because all of the victims are not presently known, joinder would be impracticable.[18]

64. No black was hired in Sales by the Company until Ennis Graves' employment on August 1, 1977, more than three years after plaintiffs' charges were filed with EEOC. Between 1965 and Graves' employment, the Company hired 64 salesmen, 32 from outside and 32 promoted or transferred from within. Twenty-three salesmen were hired or promoted between 1971 and the date of trial. Only one black has been hired as a salesman although

blacks constituted 8.69 percent of the external and 20.71 percent of the internal available job market. (Trial Transcript, pp. 211-214, 231-236, 540-570; Plaintiffs' Exhibits 81a and 84)

65. The number of salesmen hired between 1971 and the date of trial is not large enough to draw any statistically significant conclusions.[19] (Trial Transcript, pp. 540-570) Defendant's total exclusion of blacks from sales positions, however, with the exception of Graves, was sufficiently pervasive and was well known. Although qualified black applicants existed and several, including Drakeford, applied, no black was hired until 3 years after plaintiffs' charges in 1974 and the institution of this action. All of the blacks affected by the Company's practices in hiring salesmen are not known. The number affected, however, is sufficiently large to make joinder impractible.[20]

66. Laura Harvey was the first black hired in the office. (Trial Transcript, pp. 462-469) Although qualifications for Sales differ from some of the other Office jobs, black exclusion from office jobs was implemented by the same basic practice, namely defendant's refusal to hire or promote a black into any office job because of race.

67. In being denied employment as a supervisor and as a salesman, Drakeford was affected by the same practice which excluded black employees and applicants from sales and supervisory positions as well as from other Office positions. There was and is no conflict in Drakeford's position and that of other incumbent employees or that of outside applicants for employment who wish to be assigned or promoted to or hired as a supervisor, salesman or as a salaried employee. Incumbent black employees and black applicants were treated in the same way and no preference or different status was accorded

one because of his employment with the Company.

68. The factual questions raised by the claims of plaintiff Drakeford and of other black applicants for employment and employees desiring supervisory and Office positions are basically the same. Drakeford and the class have demonstrated that race was the basis for the exclusion of blacks from supervisory and Office positions.

69. The claims of Drakeford and of the class are typical. The Company has suggested some objective criteria for selection of salesmen and supervisors. These standards have been applied by an all-white staff. No effort was made to establish job relatedness of whatever standards were employed. The result has been the total exclusion of blacks from sales and supervisory positions until after plaintiffs' charges. The evidence demonstrates that Drakeford and other blacks were qualified for the positions but not

employed or promoted.

70. Plaintiffs are adequate representatives of the class. Plaintiffs have been affected by the same practices which have excluded other blacks from supervisory, sales and Office positions. After complaining about defendant's practices, plaintiffs, including the intervenor, were subjected to harassment and intimidation. They are represented by competent counsel who are experienced in litigating class action, employment discrimination cases and have demonstrated their willingness and ability to represent the class adequately and effectively.

71. This proceeding has demonstrated that a class action is preferable to a number of separate trials raising the same factual issues. The time and convenience of the Court and the time of and costs to the parties are best served by a single class action proceeding.

Claims against the Union defendants

72. The Union defendants have no responsibility or authority with respect to the hiring of production employees or the hiring or promotion or transfer of employees to supervisory, managerial or office job positions.

73. The Company administers the seniority provisions of the Collective Bargaining Agreement. It determines which probationary employees to recall in order that they might establish a seniority date.

74. Except for the harassment of Holsey and Frazier and the Company's refusal to allow them to exercise their plant seniority to bump junior white employees, the Union defendants had no responsibility for the discriminatory practices found with respect to the plaintiffs and the class. The Union grieved and discharged its responsibility regarding the harassment of Holsey and Frazier in attempting

to use their plant seniority and of Bennett in attempting to establish seniority.

Injuries suffered by the plaintiffs and certain identified class members

75. Plaintiff Holsey sustained loss of income during 1974, 1975 and 1976 because of the Company's refusal to permit him to establish seniority in Sausage. Additionally, he has been subjected to harassment and intimidations because of his efforts to challenge the Company's employment practices.

76. Plaintiff Frazier lost two weeks in wages during December of 1975 because the Company called in junior white employees over him. He was not allowed to establish seniority in Sausage. (Transcript, pp. 434-439) He was also harassed because of his efforts to obtain relief under Title VII.

77. Plaintiff Drakeford was denied employment as a foreman between 1973 and

February 28, 1977. He was also denied a sales position beginning in 1975. He sustained loss of income as a result of the Company's practices. Drakeford was also subjected to harassment and intimidation following his assignment as a foreman and was forced to leave his employment with the Company on November 28, 1978, and has sustained loss of income as a result.

78. Linwood Edwards was continuously denied assignment as a supervisor following his transfer to Mecklenburg County in 1969. He was more qualified for the supervisory positions filled in 1973 and 1976 than the white employees selected. Edwards has sustained loss of income because of the Company's practices.

79. Mynell Bennett and Janie Hill were denied the opportunity to establish seniority during 1970. Junior white employees, with no more or less qualifications, were called to work over them. Bennett complained about the

discriminatory practices and was discharged on January 14, 1972. Hill was unable to establish seniority until March, 1971.[21] Bennett and Hill lost income because of the Company's discriminatory practices.

80. Laura Ellen Harvey was denied job duties and pay in 1979 as an office supervisor because of her race. She was discriminatorily denied employment in Sales although qualified and was harassed and retaliated against after she complained about the Company's racial practices. Harvey lost income because of the Company's practices.

CONCLUSIONS OF LAW

1. The Court has jurisdiction of this action and of the parties to this proceeding under Title VII, 42 U.S.C. §2000e et seq. Holsey, Frazier and Drakeford filed charges of discrimination with EEOC on March 4, 1974, obtained a right-to-sue letter and timely

instituted this proceeding under Title VII, 42 U.S.C. §2000e-5; Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Intervenor Bennett also exhausted the administrative requirements of Title VII and timely moved and was allowed to intervene. Braxton v. Virginia Folding Box Co., 72 F.R.D. 124 (E.D. Va. 1976). However, since Bennett's complaint was filed more than 3 years following her discharge, she is limited to relief under Title VII. Holsey, Frazier and Drakeford may maintain this proceeding under 42 U.S.C. §1981.

2. The Court previously conditionally certified this action as a class action under Rule 23(b)(2) and (3) and defined the class as all black applicants for employment and black employees of the Company's Mecklenburg County, North Carolina facility who have been adversely affected, at any time since July 27, 1971 (6 months prior to Bennett's charge filed with EEOC), by the Company's racially

discriminatory employment practices. After reviewing the conditional class certification following trial, Stastny v. Southern Bell Tel. & Tel. Co., ____F.2d ___, 23 FEP Cases 665 (4th Cir. 1980), the Court reaffirms and finalizes class certification.

More than 40 to 60 black employees of the Company annually and 20 black applicants for employment have been affected by the Company's practices. Hill v. Western Electric Co., 596 F.2d 99, 102 (4th Cir.), cert. den., 444 U.S. 929 (1979), limits an employee's standing to represent applicants for employment:

> The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring.

The instant proceeding is quite different from Hill. Drakeford sought employment as a supervisor and salesman. His request or application, although as an employee, placed

him in no different standing than an applicant for employment. He is given no greater status for consideration as a supervisor or salesman because of his employment than a non-employee applicant. If selected, he is treated the same as a new employee. Thus, unlike Hill, Drakeford has no antagonistic interests to applicants for employment and his claims are typical to those of the class. Stastny supra, 23 FEP Cases 670:

> In disparate treatment theory, this [the commonality claim] is the "pattern or practice" followed as an employer's "regular or standard operating procedure," which so demonstrably treats women [here blacks] in relatively unfavorable ways that it justifies a rebuttable inference that it proceeds from an intention to treat them differently simply because of their sex [here race].

See also, Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 39-45 (N.D. Cal. 1977). Drakeford has demonstrated that the Company's criteria and procedure used in selecting supervisors, salesmen and other

Office employees have been consistently employed to exclude black employees and applicants; that the practice has been pervasive and has unfavorably affected a number of black candidates, making impractical their joinder.

The claims of plaintiffs and of the class raise common questions of law and fact. The claims of the plaintiffs are also typical of those of the class. Plaintiffs have demonstrated that over an extended period the Company totally excluded black applicants for employment and employees from supervisory, sales and other Office positions solely because of race. No changes were made in this practice until after plaintiffs complained to EEOC and instituted this proceeding. The Company failed to articulate a reasonable non-racial basis for its action. Plaintiffs have accordingly demonstrated a "uniform pattern and practice" by the Company which impacted unfavorably upon black applicants for

employment and employees. Harriss, supra; Stastny, supra.

Plaintiffs are and have been adequate representatives of the class and have fairly and adequately represented the class' interests.

This action also satisfied the requirements of Rule 23(b)(2) and (3). The Company has refused to hire or promote black candidates to the positions in question solely because of race. To remedy this practice, final declaratory and injunctive relief is appropriate. Back pay and individual injunctive relief are also necessary. However, common questions of law and fact predominate and class treatment provides a more appropriate, efficient and effective means for final resolution of this action.

3. The time period covered by this action is July 27, 1971, through the date of trial. Bennett filed her charge on January 27, 1971, alleging that the Company had

followed a pattern and practice of excluding blacks, including her, from certain job positions and that she had been retaliated against because she complained to the Company about its racial practices. Her charge sufficiently raised issues of racially discriminatory hiring, job assignment, selection for supervisory and Office positions and retaliation because of efforts to utilize Title VII. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976); EEOC v. Western Pub. Co., 502 F.2d 599, 602-603 (8th Cir. 1974). Since her charge is the earliest of those involved here, the Court properly uses it as the basis for establishing the beginning period of liability, Russell v. American Tobacco Co., 374 F. Supp. 286 (M.D.N.C. 1973), modified in part and aff'd in part, 528 F.2d 357 (4th Cir. 1975), cert. den., 425 U.S. 935 (1976), and under 42 U.S.C. §2000e-5(e), discriminatory acts occurring

within 6 months prior to her charge (July 27, 1971) may appropriately be raised. Wilhite v. South Central Bell Te. & Tel. Co., 426 F. Supp. 61 (E.D. La. 1976). However, claims under 42 U.S.C. §1981 will date back three years prior to the filing of this action, or March 4, 1974.

4. The class is, therefore, defined as all black applicants for employment and black employees who have been denied employment or otherwise discriminated against by the Company because of race at any time since July 27, 1971. No class is defined as to the Union since the discriminatory practices which unlawfully affected the plaintiffs and the class were imposed exclusively by the Company.

5. Plaintiffs may establish a violation of Title VII or 42 U.S.C. §1981 by either showing discriminatory impact of racially neutral practice which adversely impact on black applicants for employment or discriminatory treatment by an employer or

other party covered by Title VII in providing employment opportunities for black candidates. For discriminatory treatment, plaintiffs must also show motive or intent. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n. 15 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell-Douglas Corp. v. Greene, 411 U.S. 792 (1973); EEOC v. Radiator Specialty, 610 F.2d 178 (4th Cir. 1979). Under either theory, plaintiffs may employ statistics. Teamsters, supra at 336.

6. Plaintiffs here have proceeded under the disparate treatment theory. They must demonstrate, therefore, that defendants have consistently followed a pattern and practice which demonstrably treated black applicants for employment and black employees relatively unfavorable, thus justifying a rebuttable inference that the defendants proceeded "from an intention to treat [black candidates] differently simply because of their. . .

[race]," Stastny, supra, 23 FEP Cases at 670; Teamsters, supra at 336, or that the facts establish violations under McDonnell-Douglas Corp., supra at 802-803 -- (a) that black candidates have sought employment, (b) that they were qualified for the positions they requested, (c) that vacancies existed, and (d) that the defendants filled the vacancies with white employees with less or no greater qualifications than the blacks. Plaintiffs may also use a variation of the McDonnell-Douglas approach. See Teamsters, supra.

7. If plaintiffs present a prima facie case under either approach, they establish a rebuttal presumption of liability which requires that the defendants "articulate" a reasonable non-racial basis for its action. Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Kunda v. Muhlenbenberg College, 22 EPD ¶30,674 (3rd

Cir. 198); Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979).

8. Plaintiffs have demonstrated a consistent pattern and practice of the Company in limiting black candidates to certain job positions, of totally excluding them from supervisory, sales and managerial jobs and in treating them differently than white applicants and employees. Initially, blacks were limited to the Company's Operations Department, principally as laborers. A limited number of black employees were allowed to transfer to other production departments after the effective date of Title VII but discouraged from seeking assignments to higher paying jobs. No black was employed as a supervisor, in sales or in a managerial job. The first black was employed in the Office in 1973. No change was made in this practice until after plaintiffs' charges of discrimination. Such belated changes do not eliminate or explain the Company's total

exclusion of blacks from the better job positions. See United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 151-152 (6th Cir.), cert. den., 400 U.S. 943 (1970); Barnett v. W. T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

The evidence also demonstrates that black candidates were available and qualified for and actively sought the positions in question, that vacancies existed but that the Company selected white candidates with no greater qualifications or less qualifications than the black candidates.

The evidence, therefore, establishes a prima facie case of liability that blacks as a group were denied certain job positions and treated differently solely because of race. McDonnell-Douglas Corp., supra.

9. Faced with the rebuttable presumption of liability, the Company failed to offer a reasonable explanation. It indicated general, subjective criteria for

employment. For example, it imposed no educational requirement for employment in hourly job positions in production. Selection of employees was left to the general discretion of supervisors, an all-white staff. Such practices, with the attendant exclusions or limitations of black candidates, support the inference that black candidates have been denied employment solely because of race. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972), cert. den., 444 U.S. 982 (1972); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).

General selection criteria were also employed in hiring salesmen, supervisory and office employees. Again, an all-white staff made the employment decisions, resulting in the total exclusion of black candidates. Brown, supra; Rowe, supra.

Closer analysis of the Company's explanation further demonstrates its pretextuality. In instances where experience

was suggested as the basis for selection, the Company's witness, when faced with a black candidate being passed over with more experience, admitted that he was wrong.[22] In some other instances, the Company allowed that it had no explanation.[23] This same witness was relied upon by the Company for basically all of its explanations of the disparaties. His admitted misrepresentations, his decorum and the documentary evidence simply made his testimony unreliable and the Court refuses to accept it. And while the Company need only offer a reasonable, non-racial explanation for its practices and does not assume the burden of proof, it has failed to provide even a reasonable explanation. See Sweeney on remand, 604 F.2d 106 (1st Cir. 1979).

10. Plaintiffs' prima facie case is thus unrebutted, see Stallings v. Container Corp., 75 F.R.D. 511 (D. Dela. 1977); United States v. Commonwealth of Virginia, ___F.2d ___ (4th Cir. Nos. 78-1764, 78-1765 and 78-1840, April

17, 1980), and the Court is persuaded that plaintiffs have carried their burden of establishing liability.

11. Once a pattern and practice of employment discrimination is established, the Court should evaluate the individual claims against that background. Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978).

12. Mynell Bennett and Janie Hill applied for employment with the Company in 1971. The first black females had been hired by the Company in 1969. White women had been employed before 1969 but all women were relegated to women jobs under defendant's A, B and C[24] job classification system, now abandoned.[25] Bennett and Hill were considered only for women jobs. They were not allowed to establish seniority.[26] Rather, the Company employed white employees, junior to Bennett and Hill, and allowed the white employees to establish seniority over Bennett and Hill. The Company suggested that the white employees

had gained experience at a competitor. Plaintiffs demonstrated, however, that they had acquired experience at the Company and had successfully performed their jobs. No evidence was offered to show that the white employees were able to perform the various jobs more efficiently or effectively than plaintiffs. The only reasonable conclusion the Court can draw from the facts established is that the white employees were simply given preference over Bennett and Hill because of race. McDonnell-Douglas Corp. v. Greene, supra. This conclusion is further buttressed by the fact that white high school students, with no experience, were also given preference over Bennett and Hill during the period that Bennett and Hill were attempting to establish seniority. The Company offered no explanation for this preference.

13. Bennett complained about the preference being given to white employees. The next day, without any notice, the Company

advised the North Carolina Employment Security Commission that Bennett was being discharged because, as a probationary employee, she "did not prove satisfactory." Bennett had just been assured by the Company that her work was satisfactory. Moreover, in other instances where employees had challenged practices of the Company as racially discriminatory, the Company had retaliated against them.[27] Viewed against the Company's historical discriminatory practices, the Court concludes that Bennett was discharged in violation of her rights under 42 U.S.C. §2000e-3(a) (Section 704a) of Title VII.[28] Even independently of the historical background, the Company's discharge of Bennett violates Section 704(a). Berg v. LaCross Cooler Co., 612 F.2d 1041 (7th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Hylands v. Kenner Products Co., 13 EPD ¶11,427 (S.D. Ohio 1976).

14. Holsey and Frazier have shown that

they were intentionally treated differently in their efforts to exercise their seniority rights after 5 years of employment. Article XV, Section 15.7 of the Collective Bargaining Agreement than in effect[29] permitted an employee with 5 or more years of seniority to use his date of hire seniority to bump junior employees across departments in the event of lay-offs. The Company was to establish its work compliments for each department weekly, "no later than Thursday noon."[30] In the event of lay-off, the Company was to use its bumping rosters[31] to select the most senior employee on lay-off to bump junior employees in other departments. An employee on lay-off in another department, even though working temporarily, could not be bumped.[32]

After Holsey and Frazier, who were assigned to Beef, established 5 years of continuous employment, they sought to bump employees in Sausage who were junior to them. Neither was allowed to do so. The Company

offered several explanations, neither of which the Court finds reliable.[33]

The Company indicated that Holsey and Frazier refused to bid into Sausage between 1971 and 1973 although vacancies existed. However, during this period, Holsey and Frazier were permanently assigned to jobs in Beef which paid more than the Sausage jobs. Additionally, there was no requirement that one first attempt to bid into Sausage before one could bump there after establishing 5 years continuous company seniority. Holsey was out sick during a part of 1975 and 1976, but was available for work and did work in Operations as a cleaner during a part of the period. No explanation was offered, for example, for not allowing Holsey to bump into Sausage between December 1974 and May, 1975. The Company suggested that no employee worked in Sausage during 1975 and 1976 on a permanent basis who was junior to Holsey, but the record demonstrates that several white employees who

were junior to Holsey worked basically continuously in Sausage during the period.[34] Even if the Company classified them as "temporary," it was only through subterfuge to force Holsey and Frazier to go to Operations and to allow the junior employees in Sausage to work.

Moreover, Holsey and Frazier have shown a continuous practice of harassment by the Company because of their efforts to challenge the Company's racial practices. The Company attempted to discourage Holsey from bidding on job positions in Beef. He bidded anyway and was assigned but then was required to perform duties not imposed on the previous white employees; he was not called to work properly or paid his correct salary.[35] He was unfairly disciplined.

Additionally, the Company had historically limited the assignment of black males to Sausage. The first black women were employed in Sausage in 1969 and the first

black male in 1976.[36]

Viewed against this background, the Court concludes that Holsey and Frazier were prohibited from establishing seniority in Beef because of their race and because of their efforts to exercise rights under Title VII.

15. Drakeford actively sought employment as a supervisor and in sales but was denied both positions until after he filed charges with EEOC. Drakeford has demonstrated that he was treated differently solely because of his race. Vacancies in supervisory positions existed in 1973 and 1976. Junior white employees were selected although Drakeford was more qualified and experienced than the white employees selected. Defendant's explanation is clearly pretextual.

Defendant suggested that Drakeford needed more experience. He was more experienced, however, than the employees selected in 1973 and 1976, including the supervisory trainees employed during this same period. Drakeford

was promoted after his charge and 4 days before this action was filed with no additional training.

The supervisory trainees were college graduates but, as admitted by defendant, no such training was necessary to perform the job. In fact, defendant abandoned the requirement because college trained employees simply found the work unacceptable for their degree of training. The college degree requirement impacted adversely on black applicants and was not job related. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The trainees also filled vacancies for which Drakeford was qualified. Several of the trainees were later permanently assigned as supervisors and some subsequently as salesmen and managers.

The Company's employment of Drakeford as a supervisor after his charge does not refute the clear evidence that he was denied

employment as a supervisor because of his race before his promotion. Barnett, supra.

Drakeford was also denied employment in sales in 1975 and thereafter because of his race. He applied for sales, was a protected employee under Title VII, was qualified, a vacancy existed but the Company employed white employees with no greater qualifications than Drakeford. McDonnell-Douglas Corp. v. Greene, supra. The Company failed to offer any credible evidence in explanation of its refusal to employ Drakeford in sales, nor for its failure to employ any black in sales until after this action was filed. The Company employed subjective employment criteria by an all-white staff which resulted in the total exclusion of black candidates.

After Drakeford's assignment as a supervisor, he was denied equal status and job duties and was subjected to harassment. Company officials knew of these practices since they were brought to their attention by

Drakeford but failed to take appropriate steps to have them eliminated. The employment conditions imposed by the Company forced Drakeford to terminate his employment in violation of Section 704(a). Sherrill v. J. P. Stevens & Co., 410 F. Supp. 770 (W.D.N.C. 1975), aff'd 551 F.2d 308 (4th Cir. 1977); cf. DeGrace v. Rumsfeld, 22 EPD ¶30,621 (1st Cir. 1980); Calcote v. Texas Educational Foundation, 578 F.2d 95, 97-98 (5th Cir. 1978); Young v. Southwestern Savings & Loan Ass'n., 509 F.2d 140 (5th Cir. 1975).

16. Linwood Edwards was denied employment as a supervisor because of his race. Unlike white employees who were allowed to transfer from a closed unit in their same job position, Edwards was denied this opportunity and continued to be denied employment as a supervisor thereafter. Defendant's witness who attempted to explain the Company's action admitted that there was no explanation. Additionally, defendant had

denied supervisory positions to all black candidates until after plaintiffs' charge. Edwards has established clear entitlement to relief under McDonnell-Douglas Corp. v. Green, supra and Sweeney, supra.

17. Laura Harvey, employed in 1973, was the first black employed in the office. She was promoted to a supervisory position in 1979 but prevented from supervising white employees simply because they did not wish to be supervised by a black person. Defendant's practice in this regard clearly violates Title VII, 42 U.S.C. §2000e-2(a). See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972), cert. den., 406 U.S. 957 (1972). Under these conditions, Harvey was forced to terminate her employment in March 1979, but was rehired in May, 1979 without being subjected to the same conditions. All supervisory duties were transferred to the head of her department. Calcote supra.

18. Harvey also sought employment in

sales in 1975 and thereafter. She was qualified for the position and vacancies existed. The Company denied her employment in sales because of her race. McDonnell-Douglas Corp. v. Greene, supra.

19. Harvey complained about the Company's racial practices and was subjected to harassment. She was denied training on the switchboard and assigned extra duties. No explanation was offered by the Company for these practices and in view of its consistent practice of harassing and intimidating black employees who sought to exercise their rights under Title VII, the Court concludes that Harvey was also deprived of rights under Section 704(a). Berg v. LaCross Cooler Co., supra.

20. The discriminatory practices established by the record have been implemented exclusively by the Company. The union defendants have and have had no responsibility with respect to hiring, initial

job assignments, or promotions, except to ensure that they are carried out in production pursuant to the Collective Bargaining Agreement. Supervisors, salesmen and other office employees have been selected exclusively by the Company. Where employees, including Holsey and Frazier, have been denied rights under the collective bargaining agreement, the Union has sought to challenge the practices by grieving. The Court finds and concludes that the evidence fails to demonstrate any act or conduct on the part of the Union which violate Title VII or 42 U.S.C. §1981. The Union is not a necessary party to effectuate relief to which the plaintiffs and the class are entitled. See Teamsters, supra at 356 and n. 43.

21. Having found that the Company has engaged in practices which violated Title VII and 42 U.S.C. §1981, the Court must now devise an appropriate remedy. The remedy should, so far as possible, place the plaintiffs and the

class in the position they would have occupied in the absence of the discriminatory practices established by this record. Albemarle Paper Co. v. Moody, supra at 421-422:

> It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Frank v. Bowman Transportation Co., 424 U.S. 747, 763, 771 (1976).

> "To effectuate . . . [the] 'make whole' objective, Congress in §706(g) [42 U.S.C. §2000e-5(g)] vested broad equitable discretion in the federal courts to 'order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . ., or any other equitable relief as the court deems appropriate'. . . .
>
> "No less than the denial of the remedy of back pay, the denial of seniority [and other equitable] relief to victims of illegal racial discrimination . . . is permissible only for reasons which, if applied generally, would not frustrate the

> central purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.'"

22. Plaintiffs and members of the class have sustained losses of pay as a result of the Company's discriminatory practices. They are entitled to be made whole and the Court knows of no reason to deny back pay relief in this case. Albemarle Paper Co. v. Moody, supra. Plaintiffs and the class should also receive front pay -- future pay at the rate of the positions they were wrongfully denied -- until they are placed in a job of equal or higher pay. Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976).

23. Plaintiffs and the class are also entitled to injunctive relief, enjoining the Company for continuing racially discriminatory hiring practices, including sales and supervisory positions, from administering the seniority provisions of the collective bargaining agreement in a racially

discriminatory manner, from denying equal terms, status and conditions of employment to blacks employed as supervisors and from retaliating against or harassing or intimidating black employees who seek to exercise rights under Title VII. Franks v. Bowman Transportation Co., supra; Barnett v. W. T. Grant Co., supra.

24. Class members who have been denied employment in sales and supervisory positions are entitled to injunctive relief directing that they be placed in such positions at the first appropriate vacancy. Franks v. Bowman Transportation Co., supra. "Bumping" or displacement of incumbents in these positions is not permissible. Patterson v. American Tobacco Co., supra at 267-269. Rather, class members will be awarded front pay until they can be placed in their rightful position. Ibid.

25. Since the Court has found class discrimination in hiring in supervisory and

sales positions, class members are presumptively entitled to back and front pay and an order directing that they be employed at the next vacancy. In order to demonstrate individual entitlement, a class member need only show that he or she is a member of the class who actively sought or would have sought[37] employment in Sales or as a supervisor and provide, at the relief stage of this proceeding, information regarding his or her loss of income. Teamsters, supra, 361-371; Sledge v. J. P. Stevens & Co., supra at 637-638.

26. Plaintiffs and several class members testified at trial. These individuals have established their entitlement to relief. Holsey and Frazier are entitled to injunctive relief and loss of pay for the time they were unable to work while employees junior in seniority to them were allowed to work in Sausage in 1974 for Holsey and Frazier and 1975 and 1976 for Holsey. Drakeford is

entitled to injunctive relief, including an order directing his reinstatement as supervisor free of the discriminatory conditions and for back pay as a supervisor from July 30, 1973 through February 28, 1977, the date of his employment as supervisor and from November 28, 1978, until he is reinstated. He is also entitled to loss of pay as a salesman from 1975 until he is employed in Sales but any recovery for loss of pay as a salesman must be offset by any recovery for loss of pay as a supervisor. Bennett and Hill are entitled to injunctive relief, including the seniority date they should have received but for the discrimination, and to back pay from June, 1971 through the present for any day they lost pay while employees hired after Bennett and Hill in Sausage were allowed to work. Edwards is entitled to injunctive relief, including an order directing that he be employed as a supervisor in production at the next vacancy

and to back and front pay from July 30, 1973, until he is so employed. Harvey is entitled to injunctive relief, including an order directing that she be employed in Sales at the next vacancy, and to back and front pay as a salesperson from 1975 until she is employed in Sales.

27. A master will be appointed with appropriate instructions to recommend the exact individual relief to which the plaintiffs and the class members are entitled. UTU v. Norfolk & Western Ry. Co., 532 F.2d 336 (4th Cir. 1975); Sledge v. J. P. Stevens & Co., supra.

28. Plaintiffs, as prevailing parties, are entitled to their costs, expenses and reasonable attorney fees. 42 U.S.C.

§2000e-5(k); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); 42 U.S.C. §1988.

This 13 day of March, 1980.

s/James B. McMillan
United States District Judge

Footnotes

1 With a merger following the filing of this action, the name of the Union was changed to United Food and Commercial Workers International Union, AFL-CIO, and Local 525, United Food and Commercial Workers International Union, AFL-CIO. See Order of July 2, 1979.

2 The Court found "very little indication in the record that defendant unions might be liable under any theory" but felt that outright dismissal would be "inappropriate at this preliminary stage."

On May 22, 1979, the Court denied the Company's motion for reconsideration of the class certification order and for certification of the order for appeal under 28 U.S.C. §1292(b). The Court found that the evidence amply supported the order and that certification under §1292(b) would not "materially advance the conduct of the action." Additionally, the Court found no irreparable injury to defendant since the Court would again consider the conditional class certification following the hearing on the merits which was to take place within a few months.

3 By Order of February 9, 1979, the Court partially allowed the Company's motion to dismiss. The individual claims of intervenor Bennett based on 42 U.S.C. §1981 were dismissed as untimely. However, the other motions of the Company to dismiss and for partial summary judgment were denied. Pending or renewed motions of the defendants will be disposed of herein.

4 The Company strenuously denied that Holsey was discouraged from bidding to promote in

Beef or that he was harassed after doing so. The Court has carefully reviewed the conflicting testimony and documentary evidence and resolves this controversy in favor of the plaintiff. Defendant's denials and explanation simply are not credible.

* See Footnote 5, infra.

5 Much of the evidence involved in this proceeding is in conflict and require a determination by the Court of whose testimony or exhibits to believe. See footnote 4, supra. Defendant's justification for limiting Holsey's bumping rights to Operations is based exclusively on the testimony of Paul Gibson, the Manager of Operations. The Court has carefully reviewed Mr. Gibson's testimony and demeanor as well as the documentary evidence and finds the explanation offered by Mr. Gibson to be unreliable and inconsistent with the documentary evidence, including the collective bargaining agreements, the seniority rosters, the daily work force contingents and the Company's exhibits.

6 Phifer is black. He was not active like Holsey, however, in challenging the Company's discriminatory practices. In restricting Holsey's bumping rights, the Company was following a consistent pattern of retaliating against Holsey because of his efforts.

7 "Employees working as temporary replacements hired on a day-to-day basis... are not subject to bumping. As a matter of clarification an employee hired as a temporary replacement in his own department is to be laid off in preference to

employees who have bumped into this department when the need for temporary replacement no longer exists." Plaintiffs' Exhibit 22E, Collective Bargaining Agreement for 1973-1976, p. 74.

[8] Holsey was advised that he could bump junior employees in Operations. The same opportunity was extended to Bowen, a white employee. Bowen, however, wanted to transfer to Operations. Holsey preferred to transfer to Sausage because the work was not as physically demanding and he had suffered an injury to his back.

[9] See footnotes 4 and 5, supra.

[10] M. G. Brown, T. M. Harris, S. A. Long, J. H. Ortwein, R. Q. Roof, J. W. Rose and N. H. Thummel.

[11] Drakeford was hired to replace Gary McClellan, a white supervisor on the day shift.

[12] Drakeford's testimony with respect to his treatment after promotion to supervisor was also disputed by the Company. The Court has reviewed the documentary evidence and the conduct and testimony of the parties and finds Drakeford's testimony much more creditable.

[13] Between 1965 and 1977, 64 employees worked in Sales; 32 of them came from within the Company's labor force. Eighteen of the 32 were initially hired as operatives; 11 of those moved directly from operative positions into Sales. (Trial Transcript, pp. 543-545)

[14] This finding is based on the analyses and testimony of plaintiffs' consultant.

(Trial Transcript, pp. 540-570) The Company has selected salespersons externally and internally (50 percent of the 64 employees working in Sales since 1965 have promoted from within). Some have had prior sales experience - 18 of 32 hired from the external market; others, however, have had no prior sales experience. (Plaintiffs' Exhibit 81d) Based on the Company's hiring practices and considering the employment of blacks in Sales from the 1970 Census and the North Carolina Employment Security data, the Court finds and adopts the internal and external availability studies of plaintiffs' consultant.

The Company challenges plaintiffs' availability data and contends that its consultants' estimates of approximately 10 percent availability is more reliable. The Company's study, however is based on a static work force of employees as of December 31, 1977, with no consideration of the qualifications or work experience of employees selected by the Company. The Court has also evaluated the manner and decorum of the witnesses and finds the plaintiffs' availability and utilization data more reliable.

[15] At least until 1973 or 1974, defendant designated certain job positions in production as "A" jobs limited to men, "B" job positions limited to women and "C" job positions open to both men and women. Bennett was assigned to a "B" job. (Trial Transcript, pp. 82-83)

[16] Ann Long, Ruth English and Peggy Hicks.

[17] The Company's consultant indicated that although small, the sample indicated no

discrimination. For the reasons stated in footnote 14, supra, the Court is unable to accept this testimony.

18 In certifying the class, see Order of May 1, 1979, the Court found that the Company employed between forty and sixty black employees during each of the years since 1971. "The exact number of black applicants for employment is uncertain, but appears to be in excess of twenty. The Court finds that joinder of all class members would be impracticable." The Court reaffirms this finding as well as others made in the May 1, 1979 Order.

19 Again, the Company's consultant challenges this position, indicating that the data suggest no discrimination. For the reasons stated in footnote 14, supra, the Court refuses to accept this testimony.

20 See footnote 18, supra.

21 Company records indicate that Hill established seniority on December 20, 1971. The Court finds Hill's testimony more reliable. Hill was unable to work on a regular basis until after Bennett filed her charge in January 1972. although junior white employees, who established seniority in December 1971, were allowed to work through March 1972. Additionally, the Company's records are not consistent on seniority dates. Some, for example, show that employees established seniority on the date of hire, without working 30 days as required by the collective bargaining agreement. Others show seniority dates 30 or more days after hire. Moreover, the Company's records show that junior white employees were able to establish seniority before Hill. (Trial Transcript, pp.

819-820)

22 See Trial Transcript, p. 822:

"COURT: What were you telling us all about the feeble nature of Edwards' Asheville time for this morning?

"A: You asked me what I was telling him, sir, about Edwards' what?

"COURT: The gist of what you said this morning was that his time in Asheville didn't count for much because that wasn't unionized and that was one reason you picked Roof [a white employee].

"A: The crux of my conversation this morning, sir, was in fact that Linwood [Edwards] came from a real small unit, very few employees, and it was not under a master labor agreement contract.

"COURT: Where did Roof come from?

"A: He was originally hired into Charlotte, sir.

"COURT: So you decided against Edwards because he'd only had two more years of unionized plant than Roof, is that the gist of what you said, plus all the time he had at the non-unionized plant?

"A: That could be taken from what I said, yes.

"COURT: Doesn't make much sense, does it?

"A: No sir, it doesn't."

23 See, for example, Trial Transcript, p. 666 (witness does not know whether white

employees allowed to work in preference to Mynell Bennett and Janie Hill performed better than Bennett and Hill); p. 696 (witness does not know whether white employees in Sausage who were junior in seniority to Holsey were on lay-off during the time Holsey attempted to bump into Sausage so as to justify the Company's refusal to allow Holsey to bump into Sausage); p. 720 (witness made a mistake in stating that Holsey forfeited his bumping rights); p. 794 (witness cannot explain why Holsey was not allowed to bump into Sausage as of February 24, 1976, or thereafter); p. 820 (witness cannot explain why white employees hired after Janie Hill were allowed to establish seniority before Hill); p. 837 (witness did not check to see if Drakeford continued to be harassed after complaining). See also Trial Transcript at pp. 160-166 (witness did not talk to black employees about interest in sales or supervisory positions until after charges were filed with EEOC although the Company followed a practice of inquiring of white employees and selecting them for such positions without initial applications; witness cannot explain total exclusion of blacks from sales and supervisory positions); pp. 208-215 (witness cannot explain exclusion of blacks from sales although he hired 10 salesmen between 1973 and 1979; he interviewed at least one black and doesn't know why he was not hired); p. 244 (witness black and doesn't know why he was not hired); p. 244 (witness did not compare whites he hired in sales in sales with black applicants).

24 "A" jobs were limited to men; "B" jobs were limited to women, "C" jobs were for either sex.

[25] No sex claim is raised here as this practice was eliminated in 1973 or 1974. (See Trial Transcript, pp. 82-82)

[26] A new employee under the Collective Bargaining Agreement, was required to work 30 days during a consecutive 60 day period in order to establish seniority. Plaintiffs do not challenge this seniority provisions.

[27] See, e.g., paragraphs 14, 15 and 17, infra.

[28] "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment. . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceedings, or hearing under this subchapter.

[29] The 1976 Collective Bargaining Agreement changed the time period to 1 year. The seniority provisions are not being challenged here; rather, plaintiffs contend that they were administered by the Company in a racially discriminatory manner.

[30] Appendix I to 1973-76 Collective Bargaining Agreement sets out the bumping procedures as follows:

PROCEDURE FOR ADMINISTERING
SECTION 15.7

In administering the procedures for handling displacement rights for employees under Section 15.7, the parties seek to achieve the following basic objectives:

(A) Displacements under the bumping procedure shall be limited to one

day per week.

(B) Employees who exercise displacement rights shall be assigned by management to jobs which can be performed with a minimum training period in order to reduce potential disqualifications.

(C) Employees who are displaced under the changed procedure shall be those employees on the active payroll having the least amount of continuous company service.

The procedure for accomplishing these objectives shall be as follows:

(1) Local plant management must decide no later than Thursday noon of each week the levels of production they wish to maintain for the following week. The production departments and the employment office are to be given this information (by a person designated this responsibility by the local Plant Manager) no later than Thursday noon in order that they can properly plan adjustments in their gangs in the plant departments and determine the employees who are to be laid off as a result of gang reductions as well as those employees to be recalled from layoff for any gang increases. The advance planning required under this procedure is the key to successful handling of the bumping procedure.

(2) As soon as the employment office determines employees who are to be laid off, such employees are to be

notified by written notice on Thursday afternoon of their layoff and of the date on which it becomes effective. The department release form for layoffs contains instructions to employees with more than 5 years continuous service who may be entitled to bumping rights in other departments. Such employees who desire to exercise displacement rights will be required to register at the employment office Thursday after completing their day's work and no later than the time to be designated by the local plant for closing of the bumping register on Friday.

The register form provides space for the employee to designate his preference (first, second and third) for exercising displacement rights in departments where the employees with the least amount of service are working. The employment office is to have available a list of such departments for review on the part of the displacing employees at the time they appear to register.

(3) Immediately after the closing of the bumping register and prior to the end of the work day on Friday the employment department will make assignments to the registered employees in the order of continuous service, giving preference to the choices indicated by the employee. When two or more employees indicate the same preference of departments, the employee with the longest service is to be given his first choice unless there are extenuating

circumstances (such as physical requirements of the job to be performed) preventing such assignment.

In Section 15.7(a)(2), it is stated that the Employment Office will proceed to assign registered employees to departments in the order of their continuous service and whenever possible in accordance with the preference indicated by the employee. Deviations from this rule are to be made in cases such as situations where the choices of departments indicated by the employees no longer exist because of the fact that longer service employees who have registered have already exercised their right and received assignments to such jobs.

Employees with the least amount of company service being displaced by the registered employees are to be notified of their layoffs preferably before they leave work on the last scheduled work day of their work week. If it is not physically possible to do so they must be notified by telegram prior to the first work day of the following week. Employees who have registered for displacement rights are to be required to stop at the employment office on their way home from work Friday in order to pick up their starting tickets for their new assignments. Actual displacement in these cases becomes effective as of the first work day of the work week immediately following their layoff.

(4) Employees who are not working on the day of their layoff and who may be eligible for displacement rights are to be notified of their layoff by wire and will be given the same opportunity to exercise displacement rights as those employees who are working, provided such employees notify the employment office of their desire and register at the employment office on Friday to receive their new assignment. This consideration is to be given to employees who are absent for legitimate reasons, such as vacations, sick leave, injury, or leaves of absence which have been authorized by management.

Local Union officers or bargaining committee members who are on approved leave of absence for the purpose of conducting Union business away from their plant City at the time of layoff, shall in the week in which they return to work be given preference on any job openings which may occur under Section 15.6 and will be given an opportunity to register for displacement rights on Thursday and Friday of that week.

(5) Employees who are eligible to exercise displacement rights but who do not register for such rights in accordance with the procedure outlined in the foregoing and employees who are disqualified after bumping into a department shall again be permitted to exercise their rights by notifying the employment office and registering for their new assignments no later than Wednesday

preceding the week in which they desire to displace. Employees who fail to obtain employment within a 60 calendar day period following their layoff or date of disqualification, as the case may be, shall not again be eligible to further displacement rights until they have been recalled in line of seniority in their own departments or hired under the provisions of Section 15.6 and subsequently laid off. Employees who are unable to obtain employment under this procedure because no other employee with less service is working during the 60 calendar day period may be granted a second 60 day period in which to exercise displacement rights provided they request such extension prior to the end of the first 60 calendar days of layoff.

Employees who are laid off and have more than 5 years of service and who are physically disabled for any or all of the 60 calendar day period shall be entitled to exercise displacement rights within a two week period following the date of their recovery or the end of the 60 day period, whichever occurs later.

Employees who accept their new assignments under this displacement procedure but without good cause fail to report as scheduled or voluntarily quit a job after bumping in on it shall not again be eligible to exercise their rights until they have been recalled in their own seniority departments and subsequently laid off. This,

however, shall not disqualify such employees under Section 15.6.

(6) In some plants it may be desirable due to peculiar circumstances to set a limitation on the number of employees who may be bumped into a department in any one week. Limitations in this area are permissible provided they can be arrived at by agreement in writing with the local bargaining committee. If serious disruptions are feared in this connection, the local plant must notify the home office since the International Office of the Union has agreed to cooperate in working out such problems.

(7) The policy of assigning the person exercising bumping rights to the job of the employee being bumped is no longer required. In changing this policy it shall be the practice to assign displacing employees to the least skill jobs in the department.

Rearrangement of regular employees remaining in the department in order to fill the jobs vacated by employees being displaced shall be made in accordance with past practice for filling temporary vacancies. (In filling the jobs of such displaced employees, however, you are not to recall employees in line with departmental seniority and instead make assignments to these jobs from regular employees who are working.) If no one in the department is capable of performing such vacated jobs, it will be necessary to train the next employee

in line with seniority from those who are on the payroll at that time.

In the event of future bumping into the department under this procedure there will be a trained senior employee available for assignment to the highly skilled job and the problem of training in the future will be minimized. In the event of such training, employees will be given a reasonable time in which to learn the job under circumstances which would be considered normal for such training in promoting employees within the department in situations other than those arising out of displacement.

Job assignments within the departments which are affected by the displacement procedures must be made on a fair and equitable basis and without discrimination.

(8) The practice of bypassing certain jobs is to be discontinued and employees having the least amount of company service are the ones who must be laid off as a result of the displacement procedure. Examples of cases where bypassing may be the exception are: (a) a mechanical department where all of the employees in the department have refused to promote to a skilled job they consider undesirable. Exceptions to this rule will be granted only in rare circumstances with home office approval and then only after local management has completely justified their position in bypassing any job. In all cases

where bypassing takes place, the supervisor must immediately start training another employee from his department seniority list to fill the job.

(9) Employees working as temporary replacements hired on a day-to-day basis under the new procedure are not subject to bumping. As a matter of clarification an employee hired as a temporary replacement in his own department is to be laid off in preference to employees who have bumped into this department when the need for temporary replacement no longer exists.

(10) Any written local agreements which are consistent with these changes in policy may be continued without change. Any deviation from the new policy must have home office approval. The objective in establishing the new policy is to make the procedure uniform throughout all plants and to hold deviations to an absolute minimum.

(11) Employees who displace and fail to report as scheduled or fail to perform properly due to deliberate action on their part shall be subject to disciplinary action. Prior to taking disciplinary action in such cases, management must advise the Local Union committee of the problem and discuss it with them.

(12) Employees who accept assignments under this procedure will be given six months temporary department

seniority in the department in which the displacement takes place. Such employees must, when recalled, return to their original seniority department or forfeit that seniority and hold seniority in the new department only from the date hired in the new department. Employees who do not elect to follow the displacement procedure may still apply for employment under the provisions of Section 15.6.

Employees, who after registering fail to accept the assignment given them by the employment office, shall have no further displacement rights until they are recalled to their own seniority department and subsequently laid off. In such cases, however, the employee whom they would have displaced, had they accepted their assignment, is to be laid off and replaced with a temporary replacement. In such cases the temporary replacement may be the employee who is laid off from the department. These cases will usually occur when the employees having the least continuous service are working in departments considered to be undesirable on the part of most employees. In these cases the Union may be instrumental in convincing employees to accept their assignments and if this occurs and the employee involved remains on his assignment for at least a one week period and then voluntarily quits he shall not be deprived of further displacement rights within a 60 day period following the date of his quitting. (Emphasis in

original).

[31] List of employees with 5 or more years of Company employ who had registered with the Company to exercise bumping rights. See Appendix I(2), supra, footnote 30.

[32] Appendix I(9), supra, footnote 30.

[33] See text at footnotes 5 and 23, supra.

[34] See findings of fact 19, supra.

[35] See findings of fact 15.

[36] See Trial Transcript, pp. 814-815; Plaintiffs' Exhibit 28B.

[37] Non-applicants have the heavy burden of demonstrating that but for the Company's pervasive practice of excluding blacks from supervisory and sales positions, they would have sought such employment, were available and were qualified for the positions. Teamsters, supra at 267-271 and n. 53.

Curtis HOLSEY; Jackie L. Drakeford; Julius Frazier; and Mynell Bennett; Linwood Edwards; Laura Harvey; Janie Hill, Appellees,

v.

ARMOUR & COMPANY, Appellant.

Nos. 81-1312, 81-1515.

United States Court of Appeals, Fourth Circuit.

Argued Dec. 11, 1981.

Decided July 23, 1982.

Before BUTZNER, RUSSELL and SPROUSE, Circuit Judges.

PER CURIAM:

Armour & Company appeals from a district court judgment concluding that the company engaged in racially discriminatory practices violative of Title VII, 42 U.S.C. § 2000e et seq. and 42 U.S.C. § 1981. Because the district court may have improperly allocated the burden of proof, we vacate the judgment of

the district court and remand the case for further proceedings.

Following the district court's decision in this case, the Supreme Court clarified the evidentiary burdens of Title VII actions. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981). The plaintiff must initially establish by a preponderance of the evidence a prima facie case of discrimination. If the plaintiff makes this showing, the burden shifts to the defendant, who must "'articulate some legitimate, nondiscriminatory reason'" for the action. 450 U.S. at 253, 101 S.Ct. at 1094 (citation omitted). This latter burden, however, is one of production, not persuasion. "It is sufficient if the defendant's evidence raises a genuine issue of fact as to whether it discriminated against the plaintiff." 450 U.S. at 254-55, 101 S.Ct. at 1094 (citation, footnote omitted). If the defendant offers a

nondiscriminatory explanation for the action, the plaintiff then must show that the proffered reasons are merely "a pretext for discrimination." 450 U.S. at 253, 1010 S.Ct. at 1094. Throughout the proceedings, the Court emphasized, "[t]he ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." 450 U.S. at 253, 101 S.Ct. at 1094.

The district court did not have the benefit of the Supreme Court's recent guidance in Burdine at the time this case was tried. The district court's findings of fact suggest that the burden of proof may have been allocated contrary to the principles of Burdine. For example, in concluding that the company discriminated against black employees in the filling of supervisory positions, the district court made the following finding: "Defendant suggested that [one named

plaintiff] lacked aggressiveness but offered no reliable evidence of how [his] lack of aggressiveness was to be measured with the number of junior white employees [who] were promoted over him to supervisory positions." The court also found that junior white employees were promoted to a supervisory position over another black applicant. It added: "Defendant offered no reliable evidence to establish that the employees selected were more qualified or even equally as qualified as [the black applicant]." This language suggests that the district court may have required the company to do more than "articulate a legitimate, nondiscriminatory reason" for their employment decision. It is possible, however, that these findings merely express factors considered in determining that the company's explanations were pretexts for discrimination.

The uncertainty surrounding the allocation of the burden of proof in this case

is enhanced by the nature of the district court's findings and conclusions. Following the trial, the district court issued a Memorandum of Decision which set forth general reasons for sustaining the plaintiffs' claims and directed the plaintiffs' attorneys to prepare findings of fact and conclusions of law. Thereafter, plaintiffs' counsel filed an extensive document which, over the objections of the defendant, was adopted by the district court with immaterial changes.

In the past we have cautioned against the practice of adopting in this manner the prevailing party's proposed findings and conclusions. White v. Carolina Paperboard Corp., 564 F.2d 1073, 1082-83 (4th Cir. 1977); Chicopee Manufacturing Corp. v. Kendall Company, 288 F.2d 719, 725-25 (4th Cir. 1961). The adversarial tone of such findings accords them less "weight and dignity [than] . . . the unfettered and independent judgment of the trial judge." The SEVERANCE, 152 F.2d 916,

918 (4th Cir. 1945). Moreover, in this case the practice increased the ambiguity surrounding the district court's allocation of the burden of proof.

Because we are unable to properly assess the district court's findings, we vacate the judgment of the district court and remand the case for further proceedings. On remand, the district court should reconsider the case in light of the principles announced in Burdine, White, Chicopee, and The SEVERANCE.

VACATED AND REMANDED.

SPROUSE, Circuit Judge, dissenting:

I respectfully dissent.

The majority succinctly and correctly explicates the evidentiary analysis required by Burdine. I, of course, agree with the majority that if the district court had imposed upon the defendant the burden of persuasion on the issue of whether Armour had legitimate, nondiscriminatory reasons for its

contested actions, such a ruling would require reversal. In my view, however, the district court's opinion properly placed upon the plaintiffs the ultimate burden of persuading the court that Armour was guilty of discriminatory practices.

Armour contends that several of the district court's findings of fact indicate that the burden of persuasion was shifted from the plaintiffs to the defendant, in contravention of Burdine. However, as the majority concedes, the findings of which Armour complains are fairly susceptible to two interpretations. If these findings are viewed as evidence that Armour was required to do more than meet a burden of production, Burdine was, of course, violated. But, they also can be viewed as indicia that the district court properly considered all the evidence offered by the defendant, along with that offered by the plaintiffs, in determining whether the plaintiffs successfully demonstrated that the

reasons advanced by Armour were pretextual. This would be entirely in accord with the Burdine analysis.

The majority concludes that this perceived ambiguity with respect to several of the district court's findings requires that the judgment of the court be vacated. If the disputed findings were standing alone, this analysis might well be correct. Viewed in its entirety, however, the district court opinion indicates that the court properly considered the burden of persuasion to at all times be upon the plaintiffs. In specifically drawn conclusions of law, the district court set out the defendant's burden once the plaintiffs had established a prima facie case: "[T]he Company need only offer a reasonable, non-racial explanation for its practices and does not assume the burden of proof . . . ." This analysis clearly is in accord with the teaching of Burdine. The district court, after reviewing the evidence presented by both

plaintiffs and defendant, concluded that Armour's explanations for its conduct were pretextual and that plaintiffs "carried their burden of establishing liability." This too is in accord with the Burdine analysis.

In my view, to conclude that the district court opinion evinces "uncertainty surrounding the allocation of the burden of proof" is to deny all meaning to the court's clear and unequivocal statements. The better approach is to give credence to all of the district court's findings by construing those few specific findings the majority finds ambiguous in harmony with the court's other, unambiguous pronouncements on the allocation of the burden of proof.

It is true that the district court opinion, even when viewed in its entirety, does not reflect every nuance of the Burdine analysis. The accident of chronology obviously made it impossible for the district court to track exactly the language of Burdine

-- a handicap suffered by every pre-Burdine opinion. Burdine, however, plowed no new sod; its principal contribution was to clarify the evidentiary analysis previously established in Title VII cases. Burdine emphatically requires that the burden of persuasion remain at all times with the plaintiff; it does not require reversal of all district court decisions which do not track precisely the Burdine language.

We should not view district court decisions, even those from the pre-Burdine era, with an uncritical eye. Neither should we, in the interest of clarity, strain to find ambiguity where none exists. The district court said that Armour "does not assume the burden of proof" and each of its findings of fact and conclusions of law is consistent with this statement. Therefore, as the district court did not incorrectly allocate the ultimate evidentiary burden, I must respectfully dissent.

84-1123

FILED
JAN 14 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

UNITED STATES SUPREME COURT
_____ TERM 1985

ARMOUR & COMPANY,

Petitioner,

vs.

CURTIS HOLSEY, JACKIE L. DRAKEFORD,
JULIUS FRAZIER, et al.,

Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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VOL. II

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Charlotte Division
C-C-77-057-M

CURTIS HOLSEY; JACKIE L. DRAKEFORD; and JULIUS FRAZIER, Plaintiffs, and MYNELL BENNETT, Intervening Plaintiff, vs. ARMOUR AND COMPANY, Defendant.	FINDINGS OF FACT AND CONCLUSIONS OF LAW

PRELIMINARY STATEMENT

Plaintiffs Curtis Holsey, Jackie L. Drakeford and Julius Frazier filed this action on March 4, 1977. They alleged that they and other black employees of and applicants for employment with defendant Armour and Company (hereinafter referred to as the "Company") were discriminated against and denied equal employment opportunities because of their race

and color. The Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO and its Local 525[1] (the Union) were also named as defendants.

The practices of the Company and Union were alleged to violate Title VII of the Civil Rights Act of 1964, 42 U.S.C. Section 2000e et seq. and the Civil Rights Act of 1866, 42 U.S.C. Section 1981. Jurisdiction of the court was invoked pursuant to Title VII, 42 U.S.C. Section 2000e-5(f)(3), 28 U.S.C. Section 1343 and 28 U.S.C. Section 1331.

Plaintiffs prayed that the proceeding be certified as a class action pursuant to Rule 23(b)(2) consisting of all past, present and future black employees and applicants for employment who have been, or may in the future be, denied employment opportunities by defendant because of race and color.

Holsey, Frazier and Drakeford filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) on

March 7, 1974. Following a cause determination, EEOC, on January 8, 1977, issued right-to-sue letters and this proceeding followed within the 90-day period permitted by Title VII.

Mynell Bennett was allowed to intervene in the proceeding as a plaintiff on June 2, 1977. Bennett had previously filed a charge with the EEOC on January 27, 1972, alleging that she had been discharged because of her race. She also alleged that the defendants maintained racially separate jobs and job classifications. Following a cause determination by EEOC, Bennett obtained a right-to-sue letter and timely moved for leave to intervene.

After reviewing the pleadings, the pretrial discovery evidence, affidavits, briefs and arguments of the parties, the court, on May 1, 1978, conditionally certified this action as a class action and defined the class, with respect to the Company, as:

> All black applicants for employment and all present and former black employees at . . . (the Company's) Mecklenburg County, North Carolina, facility, who were employed or sought employment at any time since July 27, 1971, in maintenance and production, and in sales, clerical and salaried positions, and who may have been or may be affected by the discriminatory practices alleged in the complaint, . . .
>
> However, no class certified as to the defendant unions should include either applicants for non-production jobs or non-production employees, since (a) the unions have no representational capacity with respect to such individuals, and (b) named plaintiffs assert claims against the unions only in their capacity as representatives of production employees.[2]

Notice of the pendency of the action was served on all class members as defined.

Defendants have denied plaintiffs' material allegations and have submitted various procedural and substantive motions.[3]

Trial was conducted on March 27, 28, 31 and April 1-4, 1980.

Based on the evidence received and the arguments of counsel, this court entered

findings of fact and conclusions of law on March 13, 1981. Defendant has appealed and, on July 23, 1982, the Fourth Circuit vacated this court's judgment and remanded the case for reconsideration in light of the principles of Burdine, White, Chicopee, and the SEVERANCE. Following a hearing on October 7, 1982, during which both parties addressed the issues underlying the remand, the court invited and received extensive written comments from both sides on both specific complaints about and proposals for change of the original findings of fact and conclusions of law. Where the suggested changes were consistent with the opinion of the court, improvements over the previous language of the opinion, and accurate with respect to the evidence in the record, such changes were adopted. After careful review of the written and oral comments of counsel, including twenty-seven pages of specific changes requested by the defendant, this court enters

the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. The Company has operated a meat processing facility in Mecklenburg County at its present location since 1958. It prepares meat products for sale and distribution to retail and wholesale outlets in North Carolina, South Carolina, Tennessee and Georgia (Plaintiffs' Exhibit 42, pp. 12-13 and Exhibit 43, p. 2).

2. The production operation of the Company is divided into four departments:

Operation - shipping, receiving, storage and transportation

Beef - preparation of beef products

Sausage - preparation of sausage

Maintenance - repairs and maintenance of vehicles, plant and facilities.

Additionally, the Company has maintained an office for accounting, data processing, sales, laboratory research and various clerical functions (Plaintiffs' Exhibits 23 and 45).

3. Hourly paid, production employees have been represented by the Union since 1957 (Plaintiffs' Exhibit 42, pp. 13-14 and Exhibits 22a - 22f). The Union has no authority or responsibility with respect to office employees, supervisors or managers or hourly paid employees pending completion of their probationary period.

4. The collective bargaining agreement between defendant and the Union established departmental seniority for production employees to govern job progression, promotion, lay-off and recall. Company or date of hire seniority governs vacations, pension or retirement benefits, sick leave and other fringe benefits. (Plaintiffs' Exhibits 22a - 22f).

5. Plaintiffs Holsey, Frazier and Drakeford were initially hired by the Company in production. Holsey was hired on December 1, 1969; Frazier on July 21, 1969; and Drakeford on June 17, 1969.

6. In their applications for employment, only Holsey and Frazier indicated a specific job to which they would like to be assigned, Holsey for warehouse shipping and Frazier for meat cutter or truck driver. All three, however, were initially assigned to Operations as laborers or lugger-loaders (Plaintiffs' Exhibits 15-17).

7. At the time of plaintiffs' initial employment, black employees were concentrated in the Operations Department. One or two black employees were in Beef; no black male was in Sausage. There was not and never had been a black supervisor or salesman or a black employee in the office except in a laborer's position (Plaintiffs' Exhibit 42, pp. 26-28;

Exhibit 24; Answer to Interrogatory 6; Exhibit 25; Answer to Interrogatory 1).

8. Shortly after their initial employment, Drakeford and Frazier signed job postings and were assigned to the Beef Department. Holsey was transferred to Beef during his probationary period. All three worked there on a continuous basis until lay-offs began in 1973 and 1974.

9. Between 1969 and 1973, the Company experienced a growth in sales and increased its work force from approximately 90 to over 200 employees. Since 1974, its production work force has decreased to approximately 133 at the time of trial, approximately 50 of whom worked regularly (Trial Transcript pp. 125-128).

10. With the decrease in sales, the Company began to lay off its production employees in Beef and subsequently in Sausage and Operations. Employees were laid off pursuant to their departmental seniority with

the employee with the least departmental seniority being the first to be laid off. However, employees with 5 years or more seniority were allowed to use their Company or date of hire seniority to bump the most junior employees in other departments. Thus, Beef employees with 5 or more years of Company or date of hire seniority were allowed to bump the junior employees in other departments such as Sausage or Operations. Highly skilled or trained employees in Maintenance were not subject to this bumping provision pursuant to a side or supplemental agreement between the Company and Union in 1971. The 1976 Collective Bargaining Agreement reduced the 5 or more year requirement for bumping across departments to 1 year (Trial Transcript, pp. 28 - 82, 98 - 113 and Exhibits 20A - 20H, 22A - 22F and 23).

11. Despite the cutback on production employees in 1974, the Company continued to hire and to promote employees into supervisory

and managerial positions, into Sales and into various office positions (Plaintiffs' Exhibits 20, 21, 29, 31, 81a, 83, 84; Defendant Company's Exhibit 12).

12. The Company has not established any definite criteria for hiring employees in production jobs whether hourly paid or supervisory. The Company preferred high school graduates but this was not a requirement. Rather, hourly paid employees were provided a "reasonable" period within which they were trained on respective jobs. No established period was set for on-the-job training.

This same procedure was followed for supervisors in production. No educational requirement was established. Officers of the Company subjectively selected the employee or applicant they deemed best qualified and would provide on-the-job training for the employee selected (Plaintiffs' Exhibit 23; Trial Transcript pp. 77-82, 261).

13. No objective criteria was established by the Company for office employees, including Sales. Officers of the Company tried to determine the best qualified applicant and employees transferring some production employees into sales and managerial positions (Trial Transcript, pp. 203, 228-229).

14. Prior to the filing of EEOC charges, no black employee or applicant had been selected for a supervisory or managerial position or for Sales. Indeed, the first black promoted to a foreman position, plaintiff Drakeford, did not receive promotion until four days before the suit was filed, and no black was appointed to a sales job until after suit was filed.[3b] Applicants for employment and employees were selected for these positions by an all-white managerial and supervisory staff, pursuant to the subjective standards indicated above (Plaintiffs' Exhibit

42, pp. 27-28, Trial Transcript, pp. 90-98, 171-179, 202, 214-215, 229, 249).

Individual Discriminatory Practices

15. Following plaintiff Holsey's transfer to Beef, he attempted to bid on better job positions in Beef but was discouraged by his supervisor. His supervisor discouraged him from bidding on promotion to beef boner and primal cut (beef breakdown), suggesting that he would not like the position. He submitted a bid anyway and was promoted. He was thereafter harassed by being assigned additional job duties which white employees did not have to perform, was improperly disciplined and was denied assistance in training and in the performance of his job. Plaintiff Holsey filed numerous grievances about the harassment, several of which were subsequently adjusted by the Company. For example, the Company increased

his pay by 45 cents per hour and provided a four-hour daily guarantee following a grievance on August 19, 1974; he was compensated for 2 days on October 21 and 22, 1974, and for 1 day in February 1976, because of the Company's refusal to recall him from lay-off. The Company refused to allow him to grieve that he was being discriminated against because of race in 1974 and referred him to the EEOC[4] (Trial Transcript, pp. 293-304, 357-365; Plaintiffs' Exhibit 14; Union's Exhibits 1-15).

16. Plaintiff Holsey attempted to exercise his Company or date of hire seniority in 1974 and subsequently, in order to avoid his lay-off in Beef. He attempted to bump into Sausage, a predominantly white department, but was denied this opportunity (Trial Transcript, pp. 309-327, 701-720, 794).

17. The Collective Bargaining Agreement in existence between 1974 and 1976 distinguished between temporary and permanent

lay-offs. "Temporary" lay-offs at the Armour plant were virtually continuous between 1974 and 1976. During such a period of temporary lay-offs, the Company would first determine how many workers it needed in each of the four production departments. The Company would then post weekly bumping lists in order to permit employees who had been temporarily laid off in, for example, the beef department (but who had worked at least five years with the Company) to bump temporarily into other departments. During these periods of temporary lay-offs, the bumping employee retained his departmental seniority in his original department. If the Company needed additional beef workers during a particular week, the bumped beef employees would be recalled to work in the beef department in the order of their seniority. If a beef employee had temporarily bumped into Sausage, he would establish temporary departmental seniority in Sausage, in addition to retaining his

permanent departmental seniority in Beef. Employees with fewer than five years' seniority were not permitted to bump into other departments, but retained their departmental seniority and could be recalled to work as temporary, day-to-day replacements (App. 231-32; 417-18).

In contrast to temporary lay-offs, permanent lay-offs occurred when the Company and Union agreed that a permanent reduction in the work-force was required. Permanent lay-offs were conducted on three occasions: September 2, 1974; February 26, 1975 and February 24, 1976. On those dates, the Company provided opportunities for laid-off beef employees to use the Company or date of hire seniority to bump junior employees permanently in other departments. If an employee exercised his permanent bumping rights, his recall rights would thereafter be established in the new department (App. 228-229).

18. Although establishing 5 years' seniority on December 1, 1974, plaintiff Holsey was not allowed to bump junior white employees in Sausage. He was advised that no employees junior to him were working full time in Sausage and that he could only bump junior employees in Operations (Trial Transcript, pp. 309-327, 688, 700-720, 784-794, 832-833; Plaintiffs' Exhibits 20A-20J).

19. Armour contends that the Sausage employees junior to Holsey were on lay-off and not subject to the bumping provisions of the collective bargaining agreement. However, the evidence demonstrates that the junior Sausage employees in fact worked during much of the period of their so-called "lay-off."[5] During the period in question, plaintiff Holsey was on lay-off 219 days. However, at least four Sausage employees who were junior in seniority, Bertha Cox (laid off 107 days), Dixie S. Wright (laid off 132 days), Joseph P. Newman (laid off 70 days) and Ulysses Phifer,

Jr. (laid off 82 days), were allowed to work during Holsey's lay-off.[6] The court finds that these employees were not "temporary replacements" within the meaning of Appendix I to the contract. Indeed, even if these employees had been "temporary replacements," the terms of the contract provided that such replacements "were to be laid off in preference to employees who have bumped into this department when the need for temporary replacement no longer exists."[7] Thus, although Holsey had five years company or hire date seniority, he was not allowed to exercise his seniority on lay-offs in 1974, 1975 and 1976 to bump junior employees in Sausage.[8] Accordingly, the defendant's explanation for why Holsey was not permitted to bump into Sausage is pretextual.

20. Holsey did not express an interest in a supervisory position or in Sales. He was not considered for either position although vacancies occurred during his employment

(Trial Transcript, pp. 347-348; defendant Company's Exhibit 12).

21. Plaintiff Frazier similarly attempted to exercise his Company seniority after July 21, 1974, five years after the date of his employment, but was unable to do so. Frazier was discriminatorily denied the right to bump into the Sausage department during a two-week period in December 1974, while junior white employees continued to work in Sausage (Trial Transcript, pp. 434-439). Except for this brief period of time, the court finds that Frazier was not discriminatorily denied bumping rights.

Additionally, Frazier had an interest in a supervisory position but was never selected. Defendant suggested that Frazier lacked aggressiveness, but standards by which the aggressiveness of junior white employees who were promoted over him to supervisory positions were subjective and unarticulated

(Trial Transcript, pp. 439, 760-768, 770-778, 824-829).

22. Plaintiff Drakeford began efforts shortly after his employment to promote into a supervisory position. He talked with his supervisor and the manager of his department about his interest, but junior white employees were selected over him. Although defendant contends that the junior white employees were more qualified,[9] the evidence shows, in fact, and the court finds that Drakeford was more qualified because of his greater seniority, past work performance, and overall experience with the Company. For example, Roof, a junior white employee, was selected over Drakeford in July 1973. Roof had less experience than Drakeford in the department, had no greater educational background and was demoted within five months because of his inability to perform supervisory responsibilities. Moreover, the Company never had a black supervisor prior to 1977. Defendant's

explanation for why it did not promote Drakeford to a supervisory position is pretextual. (Trial Transcript, pp. 401-406, 408-409, 747-777, 821-828).

Beginning in 1971, the Company instituted a trainee program for supervisors limiting its consideration of applicants to college graduates. The following employees were selected between 1971 and the termination of the program in 1975:

C. E. Adams -	hired 11-9-70; transferred to Sales in 7/72;
F. J. Bowden-	hired 3-12-73; transferred to purchasing clerk's job in Office and subsequently resigned;
M. G. Brown -	hired 7-30-73; discharged 11-30-74;
R. B. Clark -	hired 11-7-71; discharged in 1974;
T. M. Harris -	hired 1-7-74; discharged 12-14-74;
S. A. Long -	hired 1-11-73; resigned 2-24-73;

J. H. Ortwein - hired 4-16-74; transferred to Company's Memphis facility on 11-4-74; and

N. H. Thuemmel - hired 1-14-74; discharged 12-14-74.

(Company's Exhibit 12; Plaintiffs' Exhibits 29, 31 and 84; Trial Transcript, pp. 760-766) No black employee or applicant was selected for the program.

The Company made no effort to validate the criteria used in the selection of trainees and terminated the program after it was clear that the criteria and the program did not produce the desired results. The candidates selected either terminated their employment before permanent assignment or shortly thereafter or were assigned to more challenging and income producing employment in Sales or management. All of the eight trainees left the Company except Adams and Ortwein. Adams was transferred to Sales and Ortwein to the Company's Memphis, Tennessee

facility (Trial Transcript, pp. 747-777, 820-828).

Between 1970 and January 1977, 19 employees were hired as supervisors; 7 promoted from within; 9 were hired as new employees; and 3 employees were transferred into foremen positions from other facilities. One of the 19 was employed from a closed competitor. No black was selected as a foreman during this period, although black employees constituted 25.11% of the Company's work force and several, including Drakeford, had expressed an interest in a foreman's position. Black candidates also constituted 14.66% of the outside available work force. By combining the internal and external availability, one would expect 8.25% black foremen as of January 1, 1977 (Trial Transcript, pp. 540-570; Plaintiffs' Exhibits 81a-81d).

24. Drakeford has a high school diploma (GED), one year of business training at Evans

Business College in Charlotte and one and one-half years of mechanical training at Central Piedmont Community College in Charlotte. Additionally, he has worked for the Company in operations, Beef and temporarily in Sausage. His performance evaluation was high. He was familiar with the Company products and operations and was qualified to perform the supervisor's responsibilities. He was passed over, between July 1973 and his promotion on February 28, 1977, on more than eight occasions by junior white employees[10] with less training and experience. During this period the Company had no black supervisor (Plaintiffs' Exhibit 15; Trial Transcript, pp. 160-162, 403, 408, 766-777, 821-828).

25. Drakeford was selected as a supervisor on February 28, 1977, after the filing of his charge and four days before the filing of this action. He has not been compensated for any loss of income as a

supervisor up until his February 28, 1977 promotion. Drakeford was the first black to be hired as a supervisor.

26. Following his promotion to supervisor, Drakeford was not assigned all supervisory responsibilities. The General Foreman, Melvin Potts, would grant leave to employees supervised by Drakeford without advising him. His day shift was assigned to a white supervisor.[11] Drakeford was put on a night shift beginning at 7:00 p.m. That shift was further altered, with Drakeford assigned to come in at 4:00 p.m. in order to accommodate another white supervisor. Drakeford was denied assistance which the Company provided other supervisors[12] (Trial Transcript, pp. 405-407, 416, 751-753, 837).

27. Drakeford complained to his superiors about the difference in treatment and harassment to which he was subjected but was accorded no relief. He requested a transfer but the request was rejected. Not

being able to obtain relief and being subjected to degrading treatment, he left the Company's employ on November 28, 1978, but would like to return if assigned the supervisor's responsibilities, free of discrimination and harassment (Trial Transcript, pp. 405-407, 751-753, 837).

28. Drakeford also requested employment as a salesman. He talked with the Sales Manager in 1975 and requested a sales position. He was advised that he would be considered for the next vacancy (Trial Transcript, pp. 403-409).

29. No black employee or applicant had been hired as a salesman until after the filing of this action. Between 1971 and February 1977, the Company hired 15 salesmen, 2 from within the work force and 13 from outside.[13] Production employees had also been transferred in or hired as salesmen (Trial Transcript, pp. 540-570; Plaintiffs' Exhibit 81a-81d).

30. The Company has no written standards for selecting salesmen. Generally, the Company states that it looks for a high school graduate; a person who is honest, ambitious, neat in appearance, trustworthy, with a good personality and generally good all around. Selection of applicants is made by the Sales Manager with the Plant Manager making the final determination. Other managers and officials may have input. The determination, however, is by an all-white staff and based on the subjective standards indicated (Trial Transcript, pp. 164, 171-177, 203-224, 229-255).

31. Applicants may submit applications for sales positions at any time during the business day or may complete applications after being selected. Drakeford was not requested to complete an application and did not do so. Despite the assurance of the Sales Manager, Drakeford was never considered for a sales position.

32. Blacks constitute 8.69% of the external available work force and 20.71% of the internal work force for sales positions.[14] The first Black, Ennis Graves, was hired in sales on August 1, 1977. He resigned April 15, 1978. Virginia Davis, a black female employee, was employed as a sales clerk on December 27, 1976. Ms. Davis, however, did not have sales responsibilities. She terminated her employment on February 12, 1977. Thus, at the time of trial, no black was among the approximately 32 persons employed in Sales (Trial Transcript, pp. 210, 229; Plaintiffs' Exhibit 83).

33. Several black applicants and employees had requested assignment to sales. In addition to outside applicants and Drakeford, Thomas Brown, Dennis Williams, Henry Croutch and Laura E. Harvey requested employment as salespersons between 1975 and 1978. Defendant offered no reason for the failure to employ any of these black

applicants or other black applicants who applied during this period although vacancies existed (Trial Transcript, pp. 208, 214-215, 233, 244, 454, 468-484, 779-780). Additionally, when Harvey requested consideration for a sales position, she was told by her supervisor that Armour did not hire blacks into sales because the customers would not buy from them (App. 619).

34. Salespersons may be required to live and work in areas outside Charlotte because of the territory served by the Company. Drakeford knew that if he were hired as a salesperson he might have to work outside the City of Charlotte. Drakeford had previously taken jobs with defendant outside Charlotte, and was in fact willing and able to relocate. Drakeford was therefore available to be hired as a sales person outside the City of Charlotte (App. at 558-559). Drakeford was also experienced in and knowledgeable about the Company's products and operations, was

honest, neat in appearance, able to communicate and was, under the criteria suggested by the Company, able to perform the duties as a salesperson. The same is true of Laura Harvey (Trial Transcript, pp. 403-404, 468-484).

35. Linwood Edwards, black, was initially employed by the Company in 1949 in Asheville, North Carolina. While at Asheville, he was promoted to a supervisory position (Trial Transcript, pp. 184-189).

36. Although Asheville was nonunionized, Edwards was experienced as a supervisor and was knowledgeable of defendant's operation and procedure (Trial Transcript, pp. 184-189, 278-282).

37. The Asheville facility was closed in 1969 and Edwards was transferred to Mecklenburg County. Defendant's previous practice, which continued throughout the period of trial, was to transfer employees from closed facilities to others in basically

the same job positions they occupied in the closed facility. For example, J. E. Davis and G. E. McClellan were transferred into Mecklenburg County as supervisors from closed facilities. W. F. Myers was also transferred into the Mecklenburg facility as a supervisor from a closed facility. Edwards, however, was denied a supervisory position and assigned as a laborer (lugger loader). As indicated, the Company had no black supervisor until Drakeford's assignment in 1977, following his charge filed with EEOC (Trial Transcript, pp. 184-189; Defendant Company's Exhibit 12).

38. After his transfer, Edwards requested promotion to or assignment as a supervisor. Although junior white employees were hired as and promoted to supervisory positions after Edwards' transfer, Edwards was denied assignment as a supervisor.

39. Edwards was qualified to be assigned as a supervisor at the Company's facility. He was qualified to fill the position upon his

transfer in 1969 as well as at the time of the vacancies occurring between 1971 and the time of trial (Trial Transcript, pp. 282-283, 821-824).

Armour offered several explanations at trial for why Edwards was not made a foreman upon his transfer to Charlotte, nor promoted to one of several vacancies that subsequently occurred. None of these explanations hold up under examination. For example, defendant contended that Edwards' experience in Asheville as a supervisor occurred in a non-union plant while the Charlotte facility was unionized. However, even after Edwards accumulated union experience in Charlotte for a number of years, the Company continued to bypass him in favor of junior white employees with little or no union experience.[14a] The Company's witness also testified that Edwards was not offered the foreman trainee position because "I don't think Mr. Edwards would have taken it," despite Edwards' frequent request

to be assigned as a foreman (App. 433). As for the Company's other explanations, Edwards' extensive and satisfactory performance as a supervisor in the Asheville facility belies the after-the-fact justification that Edwards was not "aggressive" enough or lacked the interpersonal skills necessary for a supervisory position. The defendant's explanations for not transferring Edwards into a supervisory position and for subsequently failing to promote him to a foreman position are simply not credible and the court finds them to be pretextual.

40. Mynell Bennett, a black female, sought employment with the Company on July 16, 1971. She did not indicate a specific job position but was assigned to a job limited to women employees in the Sausage Department[15] (Plaintiffs' Exhibit 18).

41. Under the Collective Bargaining Agreement then in effect, one had to work 30 days during a consecutive 60-day period in

order to establish permanent status. One was classified as a probationary or temporary employee until he or she established permanent status (Plaintiffs' Exhibit 22a).

42. Probationary employees were called to work weekly or daily by their supervisor as needed. No standards had been established by the Company to govern the supervisor's discretion in calling probationary employees for work (Trial Transcript, pp. 374-380, 662-674).

43. Ms. Bennett performed her job effectively and proficiently when called. In August, 1971, the Company hired several white women[16] from the closed Swift & Company facility in Mecklenburg County. Although the former Swift employees were junior to Bennett and were also probationary, the former Swift employees were called in over Bennett (Trial Transcript, pp. 374-380).

44. The Company also employed white high school students to work during the summer

months during the time Bennett and Hill were attempting to establish seniority (Trial Transcript, p. 379).

45. The Company's practice was to call in the most senior probationary employees to work (App. 265). No preference was accorded to new employees who had experience in plants other than Armour's (App. 242). The court finds that Bennett was qualified to perform the work and that the junior white Swift employees were called in over her because of her race.

46. In January, 1972, Bennett inquired of her supervisor whether the Company was refusing to call her to work because of her race or because of her work performance. Her supervisor assured her that her work performance was acceptable and if it had not been, she would have known weeks earlier. After this conversation, however, and despite her work performance, Bennett was not again called to work and was discharged. The

Company offered no explanation for the termination of Bennett's employment (Trial Transcript, pp. 379-380, 666-670; App. 797-801, 781). The evidence shows that Bennett was discharged because of her race and in retaliation for complaining about the discriminatory refusal of the Company to call her to work.

47. Like Bennett, Janie Hill was attempting to establish permanent status and seniority. Like Bennett, Hill was denied employment while junior white, former Swift employees were allowed to work and establish seniority. Hill was qualified to perform the work and had received no complaints about her performance. Janie Hill was unable to establish seniority until March 1972. Hill's inability to establish seniority earlier resulted from the defendant's discriminatory refusal to call her into work (Plaintiffs' Exhibit 69; Trial Transcript, pp. 389-395).

48. Junior white employees who were allowed to establish seniority over Hill included Sandra McAllister, Ann Long, Ruth English, Peggy Hicks and L. Purell.

49. The Company asserts that Swift employees were more efficient than Hill or Bennett. This explanation is not credible. The Company placed new employees in jobs requiring the least skills -- jobs for which training of only a few days was needed. Moreover, one Company official testified that a Swift employee would not be given preference over employees previously hired, regardless of their experience. Also, the Company used no objective measure of "efficiency." In fact, the evidence demonstrates that Bennett and Hill were equally or more proficient and more entitled to preference because of their date of employment and performance ratings. The Company's explanation is pretextual.

50. Bennett and Hill lost wages because of the Company's refusal to allow them to work

and to establish seniority while junior white employees were allowed to do so.

51. Laura E. Harvey was employed by the Company on January 8, 1973, as a keypunch operator. Harvey was the first black in data processing and only the second black ever employed in the Office. At the time of trial, over sixty employees worked in the Office in Sales, accounting, data processing or management (Plaintiffs' Exhibit 34, App. 739-747). In 1979, she promoted to lead keypunch operator, a supervisory position, replacing a former white employee. Harvey, however, was not allowed to supervise the two white employees under her supervision. She supervised two black employees; the white employees were supervised by the manager of Harvey's department because they did not wish to be supervised by a black person. Harvey complained and quit in March, 1979, but was re-employed in May, 1979, again as a lead

keypunch operator but without supervisory duties (Trial Transcript, pp. 462-484).

52. Between 1975 and the date of trial, Harvey applied for the following job positions: Sales in 1976, 1977 and 1978; laboratory assistant in 1977; switchboard in 1976; and for a production job in Sausage in 1976. She was denied a sales position and a transfer to Sausage. A black employee was hired over her in the laboratory because Harvey lacked a background in chemistry. She was advised that she would be trained on the switchboard but was denied training until two weeks prior to trial. She was also required to work overtime after complaining about the Company's racial practices, more than other employees (Trial Transcript, pp. 462-484; 780-784). (Harvey is to be awarded no relief with respect to either the job in the laboratory or the job in Sausage.)

53. Harvey was qualified to work as a salesperson. She had some limited sales

experience and was highly recommended for her attitude, dependability and motivation; and her supervisor indicated in her 1977 performance evaluation that her sales skills were underutilized (Plaintiffs' Exhibit 36, Performance Evaluations of Laura Harris Harvey). Harvey was also qualified to supervise keypunch employees and to be trained to operate the switchboard.

54. Even if Armour had articulated a nondiscriminatory reason for its failure to transfer Harvey into Sales, Harvey also presented convincing evidence that the Company had a practice of excluding blacks from Sales jobs. One official told Harvey that blacks were not hired into Sales because the Company believed Armour's customers would not buy from a black salesperson (App. 619). In light of the Company's past practice of excluding all blacks from Sales jobs, despite the desire and availability of qualified black applicants, it

is clear that Harvey, too, was rejected for Sales on account of her race (App. 618-621).

Findings with respect to the class

55. Prior to 1965, the Company limited the employment and promotional opportunities of black applicants for employment and black employees to the warehouse (Operations) as laborers. After the effective date of Title VII (July 2, 1965), a limited number of black employees were hired or allowed to transfer into Beef and into Sausage. After signing job postings, Frazier and Drakeford were transferred into Beef in 1969 and 1970. Holsey was hired into Beef in 1969 (Trial Transcript, pp. 84-98, 160-166, 171, 202, 231-233, 293-298, 374-382, 389-395, 434-437, 450-454, 462-469; Plaintiffs' Exhibit 24, Answer to Interrogatory 6).

56. The first black women were hired in Sausage in 1969 (Trial Transcript, pp.

374-380, 389-395; Plaintiffs' Exhibits 20, 28a and 28b).

57. Prior to the charges filed by Holsey, Frazier and Drakeford in 1974, no black worked as a supervisor or in management. The Company filled these job positions by transfer, promotion or hiring of incumbent employees or by hiring new employees. Incumbent employees who were interested in these positions were required, like applicants for employment, to fill out an application for employment. Incumbent employees who sought supervisory, managerial and office positions, including Sales, were, therefore, like new applicants since they were given no preference over others; nor were they accorded any special status after employment in such positions which were not given to new hires (Trial Transcript, pp. 37-38, 229, 249; Plaintiffs' Exhibit 16).

58. Between 1965 and the date of Drakeford's promotion to supervisor on

February 28, 1977, the Company employed 37 supervisors. Twenty-seven were promoted from within; ten were new hires. Two were transferred from closed Company facilities located outside of Mecklenburg County. One was hired from a closed facility of a competitor (Trial Transcript, pp. 474-477, 820-828; Plaintiffs' Exhibits 21, 81a, 83 and 84).

59. During this period (1965-1977), black employees constituted 25.11% of the outside available job market. No black was hired (Trial Transcript, pp. 540-570; Plaintiffs' Exhibits 81a, 84). Between 1971 and Drakeford's promotion in 1977, the Company hired or promoted 19 employees to supervisory positions. Again, no black was so employed.

60. The hiring sample of supervisors during the period 1971 until 1977 is not large enough to establish a reliable statistical pattern.[17] Defendant's practices from 1965 through 1977, however, demonstrate a total

exclusion of black applicants and employees from the rank of supervisor although qualified applicants and employees were available for such positions. Additionally, Linwood Edwards was not allowed to transfer into the Company facilities on the same conditions as white supervisors from closed facilities (Trial Transcript, pp. 184-189, 540-570).

61. Testimony from the defendant's officials concerning the defendant's policies and practices of hiring into Sales and foreman positions buttresses the statistical evidence indicating discrimination. Armour does not post Sales or supervisory vacancies, provide written job descriptions for these positions or publish criteria that are utilized to hire persons for vacancies, and fails to inform minorities of the opportunities for obtaining employment. Supervisory and Sales personnel are selected by an all-white managerial staff pursuant to subjective standards (App. 363, 198, 203, 321-322, 361-362, 370-371, 357-369,

403-409, 485-486). Even though a number of experienced black employees and applicants had sought Sales and supervisory vacancies, white managers testified that they had never compared the qualifications of the blacks with the whites who were hired (App. 387, 404), and many of the salesmen had no previous sales experience (App. 359).

62. The number of black applicants and employees who have been adversely affected by the Company's practice with respect to supervisors is not known. The practice was sufficiently pervasive and widely known to affect all black employees of the Company and qualified blacks in the relevant job market to make them too numerous for joinder in this proceeding. Additionally, because all of the victims are not presently known, joinder would be impracticable.[18]

63. No black was hired in Sales by the Company until Ennis Graves' employment on August 1, 1977, more than three years after

plaintiffs' charges were filed with the EEOC. During the period between 1965 and Graves' employment on August 1, 1977, Armour employed 64 persons who worked as salesmen during at least some portion of that period. Of the 64 salesmen, 32 had been hired from outside the Company and 32 had been promoted or transferred from within. Plaintiffs' expert utilized this data in an effort to determine the approximate qualifications -- previous jobs and education, for example -- which were expected of its Sales force (see Plaintiffs' Exhibit 81(a), App. at 759-807). Twenty-three salesmen were hired or promoted between 1971 and the date of trial. Only one black has been hired as a salesman although blacks constituted 8.69% of the external and 20.71% of the internal available job market (Trial Transcript, pp. 211-214, 231-236, 540-570; Plaintiffs' Exhibits 81a and 84).

64. The number of salesmen hired between 1971 and the date of trial is not large enough

to draw any statistically significant conclusions[19] (Trial Transcript, pp. 540-570). Defendant's total exclusion of blacks from sales positions, however, with the exception of Graves, was sufficiently pervasive and was well known. Although qualified black applicants existed and several, including Drakeford, applied, no black was employed until three years after plaintiffs' charges in 1974 and the institution of this action. All of the blacks affected by the Company's practices in hiring salesmen are not known. The number affected, however, is sufficiently large to make joinder impracticable.[20]

65. The practices of hiring salesmen parallel those for hiring foremen. See finding 61, supra.

66. Although qualifications for Sales differ from some of the other Office jobs, black exclusion from Office jobs was implemented by the same basic practice, namely

defendant's refusal to hire or promote a black into any Office job because of race.

67. In being denied employment as a supervisor and as a salesman, Drakeford was affected by the same practice which excluded black employees and applicants from Sales and supervisory positions as well as from other Office positions. There was and is no conflict in Drakeford's position and that of other incumbent employees or that of outside applicants for employment who wish to be assigned or promoted to or hired as a supervisor, salesman or as a salaried employee. Incumbent black employees and black applicants were treated in the same way and no preference or different status was accorded one because of his employment with the Company.

68. The factual questions raised by the claims of plaintiff Drakeford and of other black applicants for employment and employees desiring supervisory and Office positions are

basically the same. Drakeford and the class have demonstrated that race was the basis for the exclusion of blacks from supervisory and Office positions.

69. The claims of Drakeford and of the class are typical. The Company has suggested some objective criteria for selection of salesmen and supervisors. These standards have been applied by an all-white staff. No effort was made to establish job relatedness of whatever standards were employed. The result has been the total exclusion of blacks from sales and supervisory positions until after plaintiffs' charges. The evidence demonstrates that Drakeford and other blacks were qualified for the positions but not employed or promoted.

70. Plaintiffs are adequate representatives of the class. Plaintiffs have been affected by the same practices which have excluded other blacks from supervisory, Sales and Office positions. After complaining about

defendant's practices, plaintiffs, including the intervenor, were subject to harassment and intimidation. They are represented by competent counsel who are experienced in litigating class action, employment discrimination cases and have demonstrated their willingness and ability to represent the class adequately and effectively.

71. This proceeding has demonstrated that a class action is preferable to a number of separate trials raising the same factual issues. The time and convenience of the court and the time of and costs to the parties are best served by a single class action proceeding.

Claims against the Union defendants

72. The Union defendants have no responsibility or authority with respect to the hiring of production employees or the hiring or promotion or transfer of employees

to supervisory, managerial or Office job positions.

73. The Company administers the seniority provisions of the Collective Bargaining Agreement. It determines which probationary employees to recall in order that they might establish a seniority date.

74. Except for the harassment of Holsey and Frazier and the Company's refusal to allow them to exercise their plant seniority to bump junior white employees, the Union defendants had no responsibility for the discriminatory practices found with respect to the plaintiffs and the class. The Union grieved and discharged its responsibility regarding the harassment of Holsey and Frazier in attempting to use their plant seniority and of Bennett in attempting to establish seniority.

Injuries suffered by the plaintiffs and certain identified class members

75. Plaintiff Holsey sustained loss of income during 1974, 1975 and 1976 because of the Company's refusal to permit him to establish seniority in Sausage. Additionally, he has been subjected to harassment and intimidations because of his efforts to challenge the Company's employment practices.

76. Plaintiff Frazier lost two weeks in wages during December of 1974 because the Company called in junior white employees over him. He was not allowed to establish seniority in Sausage (Transcript, pp. 434-439) and he was harassed by being denied the opportunity to bump into Sausage.

77. Plaintiff Drakeford was denied employment as a foreman between 1973 and February 28, 1977. He was also denied a Sales position beginning in 1975. He sustained loss of income as a result of the Company's practices. Drakeford was also subjected to harassment and intimidation following his assignment as a foreman and was forced to

leave his employment with the Company on November 28, 1978, and has sustained loss of income as a result.

78. Linwood Edwards was continuously denied assignment as a supervisor following his transfer to Mecklenburg County in 1969. He was more qualified for the supervisory positions filled in 1973 and 1976 than the white employees selected. Edwards has sustained loss of income because of the Company's practices.

79. Mynell Bennett and Janie Hill were denied the opportunity to establish seniority during 1970. Junior white employees were called to work over them. Bennett complained about the discriminatory practices and was discharged on January 14, 1972. Hill was unable to establish seniority until March, 1972.[21] Bennett and Hill lost income because of the Company's discriminatory practices.

80. Laura Ellen Harvey was denied job duties and pay in 1979 as an Office supervisor

because of her race. She was discriminatorily denied employment in Sales although qualified and was harassed and retaliated against after she complained about the Company's racial practices. Harvey lost income because of the Company's practices.

CONCLUSIONS OF LAW

1. The court has jurisdiction of this action and of the parties to this proceeding under Title VII, 42 U.S.C. Section 2000e et seq. Holsey, Frazier and Drakeford filed charges of discrimination with EEOC on March 4, 1974, obtained a right-to-sue letter and timely instituted this proceeding under Title VII, 42 U.S.C. Section 2000e-5; Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Intervenor Bennett also exhausted the administrative requirements of Title VII and timely moved and was allowed to intervene. Braxton v. Virginia Folding Box Co., 72 F.R.D.

124 (E.D.Va. 1976). However, since Bennett's complaint was filed more than three years following her discharge, she is limited to relief under Title VII. Holsey, Frazier and Drakeford may maintain this proceeding under 42 U.S.C. Section 1981.

2. The court previously conditionally certified this action as a class action under Rule 23(b)(2) and (3) and defined the class as all black applicants for employment and black employees of the Company's Mecklenburg County, North Carolina facility who have been adversely affected, at any time since July 27, 1971 (six months prior to Bennett's charge filed with EEOC), by the Company's racially discriminatory employment practices. After reviewing the conditional class certification following trial, Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 23 FEP Cases 665 (4th Cir. 1980), the court modifies the class definition to conform more precisely to the

evidence and findings of fact, and makes a final class certification as follows:

> All black applicants for employment and black employees of the Company's Mecklenburg County, North Carolina facility who have been adversely affected, at any time since July 27, 1971 (six months prior to Bennett's charge filed with EEOC), by the Company's racially discriminatory employment practices involving promotions or hiring into Office and management positions, including Sales and foreman positions, and retaliation for having opposed discriminatory practices or having exercised rights protected under Title VII.

More than forty to sixty black employees of the Company annually and twenty black applicants for employment have been affected by the Company's practices. Hill v. Western Electric Co., 596 F.2d 99, 102 (4th Cir.), cert. den., 444 U.S. 929 (1979), limits an employee's standing to represent applicants for employment:

> The interest of these named, employed plaintiffs in being free of discrimination in job assignments and in promotions is so different in kind from that of people who were denied any employment that the named

> plaintiffs may not properly maintain an action for redress of alleged discrimination in hiring.

The instant proceeding is quite different from Hill. Drakeford sought employment as a supervisor and salesman. His request or application, although as an employee, placed him in no different standing than an applicant for employment. He is given no greater status for consideration as a supervisor or salesman because of his employment than a non-employee applicant. If selected, he is treated the same as a new employee. Thus, unlike Hill, Drakeford has no antagonistic interests to applicants for employment and his claims are typical to those of the class. Stastny, supra, 23 FEP Cases 670:

> In disparate treatment theory, this (the commonality claim) is the "pattern or practice" followed as an employer's "regular or standard operating procedure," which so demonstrably treats women (here blacks) in relatively unfavorable ways that it justifies a rebuttable inference that it proceeds from an intention to treat them differently

> simply because of their sex (here race).

See also, Harriss v. Pan American World Airways, Inc., 74 F.R.D. 24, 39-45 (N.D. Cal. 1977). Drakeford has demonstrated that the Company's criteria and procedure used in selecting supervisors, salesmen and other Office employees have been consistently employed to exclude black employees and applicants; that the practice has been pervasive and has unfavorably affected a number of black candidates, making impractical their joinder.

The claims of plaintiffs and of the class raise common questions of law and fact. The claims of the plaintiffs are also typical of those of the class. Plaintiffs have demonstrated that over an extended period the Company totally excluded black applicants for employment and employees from supervisory, Sales and other Office positions solely because of race. No changes were made in this

practice until after plaintiffs complained to EEOC and instituted this proceeding. The Company failed to articulate a reasonable non-racial basis for its action. Plaintiffs have accordingly demonstrated a "uniform pattern and practice" by the Company which impacted unfavorably upon black applicants for employment and employees. Harriss, supra; Stastny, supra.

Plaintiffs are and have been adequate representatives of the class and have fairly and adequately represented the class' interests.

This action also satisfies the requirements of Rule 23(b)(2) and (3). The Company has refused to hire or promote black candidates to the positions in question solely because of race. To remedy this practice, final declaratory and injunctive relief is appropriate. Back pay and individual injunctive relief are also necessary. However, common questions of law and fact

predominate and class treatment provides a more appropriate, efficient and effective means for final resolution of this action.

In General Telephone Company of the Southwest v. Falcon, ___ U.S. ___, 72 L.Ed.2d 740 (June 14, 1982), the Supreme Court held that it was error for a court to certify as the representative of a class of rejected job applicants an employee who claimed that he had been discriminatorily denied a promotion without requiring a showing of the specific questions of law or fact that are common to the representative and the class she or he seeks to represent. In this case, the court has carefully considered the implications of Falcon, and has determined that it is entirely appropriate for the plaintiffs and intervenor, all of whom are employees, to represent a class that consists in part of nonemployee applicants for sales and foreman positions.

The plaintiffs and intervenor do not purport to represent all rejected job

applicants, but only those applicants who were denied Office or Sales positions or appointments as foreman. Thus, broad and general questions of the defendant's hiring practices as a whole are not called into question in this case. Second, the standards for selection to Office/Sales or foreman positions are the same for both employee-applicants and nonemployee-applicants. Thus, both groups are affected in the same way by the defendant's policies and practices of filling Office/Sales and supervisory vacancies. Third, because the plaintiffs here have personally suffered from the defendant's policies and practices of excluding blacks from Office/Sales or foreman positions, the absent class of nonemployee-applicants, as well as employees, is assured of adequate representation. The factual and legal questions concerning the existence of such a policy or practice of total exclusion of blacks from those positions are the same for

both employee-applicants and nonemployee-applicants. Finally, as a practical matter, resolving the issue of discrimination vel non in Sales and foreman positions for an employee class of applicants will also resolve that issue for a nonemployee class of applicants for those jobs. Accordingly, under the standards enunciated in Falcon, the plaintiffs/intervenors are proper representatives of a class of employee and nonemployee applicants for Sales and foreman positions.

3. The time period covered by this action is July 27, 1971, through the date of trial. Bennett filed her charge on January 27, 1971, alleging that the Company had followed a pattern and practice of excluding blacks, including her, from certain job positions and that she had been retaliated against because she complained to the Company about its racial practices. Her charge sufficiently raised issues of racially discriminatory hiring, job assignment,

selection for supervisory and Office positions and retaliation because of efforts to utilize Title VII. Sanchez v. Standard Brands, Inc., 431 F.2d 455 (5th Cir. 1970); EEOC v. General Electric Co., 532 F.2d 359 (4th Cir. 1976); EEOC v. Western Pub. Co., 502 F.2d 599, 602-603 (8th Cir. 1974). Since her charge is the earliest of those involved here, the court properly uses it as the basis for establishing the beginning period of liability, Russell v. American Tobacco Co., 374 F.Supp. 286 (M.D.N.C. 1973), modified in part and aff'd. in part, 528 F.2d 357 (4th Cir. 1975), cert. den., 425 U.S. 935 (1976), and under 42 U.S.C. Section 2000e-5(e), discriminatory acts occurring within six months prior to her charge (July 27, 1971) may appropriately be raised. Wilhite v. South Central Bell Tel. & Tel. Co., 426 F.Supp. 61 (E.D.La. 1976). However, claims under 42 U.S.C. Section 1981 will date back three years prior to the filing of this action, or March 4, 1974.

4. The class is, therefore, defined as:

> All black applicants for employment and black employees of the Company's Mecklenburg County, North Carolina facility who have been adversely affected, at any time since July 27, 1971 (six months prior to Bennett's charge filed with EEOC), by the Company's racially discriminatory employment practices involving promotions or hiring into Office and management positions, including Sales and foreman positions, and retaliation for having opposed discriminatory practices or having exercised rights protected under Title VII.

No class is defined as to the Union since the discriminatory practices which unlawfully affected the plaintiffs and the class were imposed exclusively by the Company.

5. Plaintiffs may establish a violation of Title VII or 42 U.S.C. Section 1981 by showing either discriminatory impact of a racially neutral practice which adversely impacts on black applicants for employment or discriminatory treatment by an employer or other party covered by Title VII in providing employment opportunities for black candidates.

For discriminatory treatment, plaintiffs must also show motive or intent. International Brotherhood of Teamsters v. United States, 43 U.S. 324, 335 n. 15 (1977); Griggs v. Duke Power Co., 401 U.S. 424 (1971); McDonnell-Douglas Corp. v. Greene, 411 U.S. 792 (1973); EEOC v. Radiator Specialty Co., 610 F.2d 178 (4th Cir. 1979). Under either theory, plaintiffs may employ statistics. Teamsters, supra, at 336.

6. Plaintiffs here have proceeded under the disparate treatment theory. They must demonstrate, therefore, that defendant has consistently followed a pattern and practice which demonstrably treated black applicants for employment and black employees unfavorably, as compared with similarly situated white employees, thus justifying a rebuttable inference that the defendant proceeded "from an intention to treat (black candidates) differently simply because of their . . . race," Stastny, supra, 23 FEP

Cases at 670; Teamsters, supra, at 336, or that the facts establish violations under McDonnell-Douglas Corp., supra, at 802-803 -- (a) that black candidates have sought employment; (b) that they were qualified for the positions they requested; (c) that vacancies existed; and (d) that the defendant filled the vacancies with white employees with less or no greater qualifications than the blacks. Plaintiffs may also use a variation of the McDonnell-Douglas approach. See Teamsters, supra.

7. If a plaintiff presents a prima facie case under either approach, an inference of discrimination is established. The defendant may rebut this inference by "articulating" a reasonable non-racial basis for its action. Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Const. Corp. v. Waters, 438 U.S. 567 (1978); Board of Trustees of Keene State College v. Sweeney, 439 U.S. 24 (1978); Kunda

v. Muhlenbenberg College, 22 EPD paragraph 30,674 (3rd Cir. 1980); Wright v. National Archives & Records Service, 609 F.2d 702 (4th Cir. 1979.

8. Plaintiffs have demonstrated a consistent pattern and practice of the Company in limiting black candidates to certain job positions, in totally excluding them from supervisory, Sales and managerial jobs and in treating them differently than white applicants and employees. Initially, blacks were limited to the Company's Operations Department, principally as laborers. A limited number of black employees were allowed to transfer to other production departments after the effective date of Title VII but discouraged from seeking assignments to higher paying jobs. No black was employed as a supervisor, in sales or in a managerial job. The first black was employed in the Office in 1973. No change was made in this practice until after plaintiffs' charges of

discrimination. Such belated changes do not eliminate or explain the Company's total exclusion of blacks from the better job positions. See United States v. International Brotherhood of Electrical Workers, Local No. 38, 428 F.2d 144, 151-152 (6th Cir.), cert. den., 400 U.S. 943 (1970); Barnett v. W. T. Grant Co., 518 F.2d 543, 550 (4th Cir. 1975).

The evidence also demonstrates that black candidates were available and qualified for and actively sought the positions in question, that vacancies existed but that the Company selected white candidates with no greater qualifications or less qualifications than the black candidates.

The evidence, therefore, establishes a prima facie case of liability that blacks as a group were denied certain job positions and treated differently solely because of race. McDonnell-Douglas Corp., supra.

9. After plaintiffs established an inference of discrimination, the Company

failed to offer a reasonable explanation. It used general, subjective criteria for employment. For example, it imposed no educational requirement for employment in hourly job positions in production. Selection of employees was left to the general discretion of supervisors, an all-white staff. Such practices, with the attendant exclusions or limitations of black candidates, support the inference that black candidates have been denied employment solely because of race. Brown v. Gaston County Dyeing Machine Co., 457 F.2d 1377, 1383 (4th Cir. 1972), cert. den., 444 U.S. 982 (1972); Rowe v. General Motors Corp., 457 F.2d 348, 359 (5th Cir. 1972).

General selection criteria were also employed in hiring salesmen, supervisory and Office employees. Again, an all-white staff made the employment decisions, resulting in the total exclusion of black candidates. Brown, supra; Rowe, supra.

Closer analysis of the Company's explanation further demonstrates its pretextuality. In instances where experience was suggested as the basis for selection, the Company's witness, when faced with a black candidate being passed over with more experience, admitted that he was wrong.[22a] In some other instances, the Company allowed that it had no explanation.[23] This same witness was relied upon by the Company for basically all of its explanations of the disparaties. His admitted misrepresentations, his decorum and the documentary evidence simply made his testimony unreliable and the court refuses to accept it. And while the Company need only offer a reasonable, non-racial explanation for its practices and does not assume the burden of proof, it has failed to provide even a reasonable explanation. See Sweeney on remand, 604 F.2d 106 (1st Cir. 1979).

10. Plaintiffs' prima facie case is thus unrebutted, see Stalling v. Container Corp.,

75 F.R.D. 511 (D.Dela. 1977); United States v. Commonwealth of Virginia, 620 F.2d 1018 (4th Cir. Nos. 78-1764, 78-1765 and 78-1840, April 17, 1980), and plaintiffs have carried their burden of establishing liability.

11. Once a pattern and practice of employment discrimination is established, the court should evaluate the individual claims against that background. Sledge v. J. P. Stevens & Co., 585 F.2d 625 (4th Cir. 1978).

12. Mynell Bennett and Janie Hill applied for employment with the Company in 1971. The first black females had been hired by the Company in 1969. White women had been employed before 1969 but all women were relegated to women jobs under defendant's A, B and C[24] job classification system, now abandoned.[25] Bennett and Hill were considered only for women jobs. They were not allowed to establish seniority.[26] Rather, the Company employed white employees, junior to Bennett and Hill, and allowed the white employees to

establish seniority over Bennett and Hill. The Company suggested that the white employees had gained experience at a competitor. Plaintiffs demonstrated, however, that they had acquired experience at the Company and had successfully performed their jobs. The white employees were not able to perform the various jobs more efficiently or effectively than plaintiffs. The only reasonable conclusion the court can draw from the facts established is that the white employees were simply given preference over Bennett and Hill because of race and defendant's explanation is pretextual. McDonnell-Douglas Corp. v. Greene, supra.

13. Bennett complained about the preference being given to white employees. The next day, without any notice, the Company advised the North Carolina Employment Security Commission that Bennett was being discharged because, as a probationary employee, she "did not prove satisfactory." Bennett had just

been assured by the Company that her work was satisfactory. Moreover, in other instances where employees had challenged practices of the Company as racially discriminatory, the Company had retaliated against them.[27] Viewed against the Company's historical discriminatory practices, the court concludes that Bennett was discharged in violation of her rights under 42 U.S.C. Section 2000e-3(a) (Section 704a) of Title VII.[28] Even independently of the historical background, the Company's discharge of Bennett violates Section 704(a). Berg v. LaCross Cooler Co., 612 F.2d 1041 (7th Cir. 1980); Sias v. City Demonstration Agency, 588 F.2d 692 (9th Cir. 1978); Hylands v. Kenner Products Co., 13 EPD paragraph 11,427 (S.D. Ohio 1976).

14. Holsey and Frazier have shown that they were intentionally treated differently in their efforts to exercise their seniority rights after five years of employment. Article XV, Section 15.7 of the Collective

Bargaining Agreement then in effect[29] permitted an employee with five or more years of seniority to use his date of hire seniority to bump junior employees across departments in the event of lay-offs. The Company was to establish its work compliments for each department weekly, "no later than Thursday noon."[30] In the event of lay-off, the Company was to use its bumping rosters[31] to select the most senior employee on lay-off to bump junior employees in other departments. An employee on lay-off in another department, even though working temporarily, could not be bumped.[32]

After Holsey and Frazier, who were assigned to Beef, established five years of continuous employment, they sought to bump employees in Sausage who were junior to them. Neither was allowed to do so and the court finds the Company's explanations pretextual.[33]

The Company indicated that Holsey and Frazier refused to bid into Sausage between 1971 and 1973 although vacancies existed.

However, during this period, Holsey and Frazier were permanently assigned to jobs in Beef which paid more than the Sausage jobs. Additionally, there was no requirement that one first attempt to bid into Sausage before one could bump there after establishing five years continuous Company seniority. Holsey was out sick during a part of 1975 and 1976, but was available for work and did work in Operations as a cleaner during a part of the period. No explanation was offered, for example, for not allowing Holsey to bump into Sausage between December 1974 and May 1975. The Company suggested that no employee worked in Sausage during 1975 and 1976 on a permanent basis who was junior to Holsey, but the record demonstrates that several white employees who were junior to Holsey worked basically continuously in Sausage during the period.[34] Even if the Company classified them as "temporary," it was only through subterfuge to force Holsey and Frazier to go to Operations

and to allow the junior employees in Sausage to work.

Moreover, Holsey and Frazier have shown a continuous practice of harassment by the Company because of their efforts to challenge the Company's racial practices. The Company attempted to discourage Holsey from bidding on job positions in Beef. He bid anyway and was assigned but then was required to perform duties not imposed on the previous white employees; he was not called to work properly or paid his correct salary.[35] He was unfairly disciplined.

Additionally, the Company had historically limited the assignment of black males to Sausage. The first black women were employed in Sausage in 1969 and the first black male in 1976.[36]

Viewed against this background, the court concludes that Holsey and Frazier were prohibited from establishing seniority in Sausage because of their race and because of

their efforts to exercise rights under Title VII.

15. Drakeford actively sought employment as a supervisor and in Sales but was denied both positions until after he filed charges with EEOC. Drakeford has demonstrated that he was treated differently solely because of his race. Vacancies in supervisory positions existed in 1973 and 1976. Junior white employees were selected although Drakeford was more qualified and experienced than the white employees selected. Defendant's explanation is clearly pretextual.

Defendant suggested that Drakeford needed more experience. He was more experienced, however, than the employees selected in 1973 and 1976, including the supervisory trainees employed during this same period. Drakeford was promoted after his charge and four days before this action was filed with no additional training.

The supervisory trainees were college graduates but, as admitted by defendant, no such training was necessary to perform the job. In fact, defendant abandoned the requirement because college trained employees simply found the work unacceptable for their degree of training. The college degree requirement impacted adversely on black applicants and was not job related. Griggs v. Duke Power Co., 401 U.S. 424 (1971); Albemarle Paper Co. v. Moody, 422 U.S. 405 (1975).

The trainees also filled vacancies for which Drakeford was qualified. Several of the trainees were later permanently assigned as supervisors and some subsequently as salesmen and managers.

The Company's employment of Drakeford as a supervisor after his charge does not refute the clear evidence that he was denied employment as a supervisor because of his race before his promotion. Barnett, supra.

Drakeford was also denied employment in Sales in 1975 and thereafter because of his race. He applied for Sales, was a protected employee under Title VII, was qualified, a vacancy existed, but the Company employed white employees with no greater qualifications than Drakeford. McDonnell-Douglas Corp. v. Greene, supra. The Company failed to articulate a credible explanation of its refusal to employ Drakeford in Sales, nor for its failure to employ any black in Sales until after this action was filed. The Company employed subjective employment criteria by an all-white staff which resulted in the total exclusion of black candidates.

After Drakeford's assignment as a supervisor, he was denied equal status and job duties and was subjected to harassment. Company officials knew of these practices since they were brought to their attention by Drakeford but failed to take appropriate steps to have them eliminated. The employment

conditions imposed by the Company forced Drakeford to terminate his employment in violation of Section 704(a). Sherrill v. J. P. Stevens & Co., 410 F.Supp. 770 (W.D.N.C. 1975), aff'd., 551 F.2d 308 (4th Cir. 1977); cf., DeGrace v. Rumsfeld, 22 EPD paragraph 30,621 (1st Cir. 1980); Calcote v. Texas Educational Foundation, 578 F.2d 95, 97-98 (5th Cir. 1978); Young v. Southwestern Savings & Loan Ass'n., 509 F.2d 140 (5th Cir. 1975).

16. Linwood Edwards was denied employment as a supervisor because of his race. Unlike white employees who were allowed to transfer from a closed unit in their same job position, Edwards was denied this opportunity and continued to be denied employment as a supervisor thereafter. Defendant's witness who attempted to explain the Company's action admitted that there was no explanation. Additionally, defendant had denied supervisory positions to all black candidates until after plaintiffs' charge.

The defendant's explanations for why Edwards was not transferred or promoted into a supervisory position are pretextual. See paragraph 39(a), findings of fact. Edwards has established entitlement to relief under McDonnell-Douglas Corp. v. Greene, supra, and Sweeney, supra.

17. Laura Harvey, employed in 1973, was the first black employed in the Office. She was promoted to a supervisory position in 1979 but was prevented from supervising white employees simply because they did not wish to be supervised by a black person. Defendant's practice in this regard clearly violates Title VII, 42 U.S.C. Section 2000e-2(a). See Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1972), cert. den., 406 U.S. 957 (1972). Under these conditions, Harvey was forced to terminate her employment in March 1979, but was rehired in May 1979 without being subjected to the same conditions. All supervisory duties were

transferred to the head of her department. Calcote, supra.

18. Harvey also sought employment in Sales in 1975 and thereafter. She was qualified for the position and vacancies existed. The Company denied her employment in Sales because of her race. McDonnell-Douglas Corp. v. Greene, supra.

19. Harvey complained about the Company's racial practices and was subjected to harassment. She was denied training on the switchboard and assigned extra duties. No explanation was offered by the Company for these practices and in view of its consistent practice of harassing and intimidating black employees who sought to exercise their rights under Title VII, the court concludes that Harvey was also deprived of rights under Section 704(a). Berg v. LaCross Cooler Co., supra.

20. The discriminatory practices established by the record have been

implemented exclusively by the company. The Union defendants have and have had no responsibility with respect to hiring, initial job assignments, or promotions, except to insure that they are carried out in production pursuant to the Collective Bargaining Agreement. Supervisors, salesmen and other Office employees have been selected exclusively by the Company. Where employees, including Holsey and Frazier, have been denied rights under the Collective Bargaining Agreement, the Union has sought to challenge the practices by grieving. The court finds and concludes that the evidence fails to demonstrate any act or conduct on the part of the Union which violate Title VII or 42 U.S.C. Section 1981. The Union is not a necessary party to effectuate relief to which the plaintiffs and the class are entitled. See Teamsters, supra, at 356 and n. 43.

21. Having found that the Company has engaged in practices which violated Title VII

and 42 U.S.C. Section 1981, the court must now devise an appropriate remedy. The remedy should, so far as possible, place the plaintiffs and the class in the position they would have occupied in the absence of the discriminatory practices established by this record. Albemarle Paper Co. v. Moody, supra, at 421-422:

> It follows that, given a finding of unlawful discrimination, back pay should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

Franks v. Bowman Transportation Co., 424 U.S. 747, 763, 771 (1976):

> To effectuate . . . (the) "make whole" objective, Congress in Section 706(g) (42 U.S.C. Section 2000e-5(g)) vested broad equitable discretion in the federal courts to "order such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay, . . ., or any other equitable relief

> as the court deems appropriate."
> . . .
>
> No less than the denial of the remedy of back pay, the denial of seniority (and other equitable) relief to victims of illegal racial discrimination . . . is permissible only for reasons which, if applied generally, would not frustrate the central purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination.

22. Plaintiffs and members of the class have sustained losses of pay as a result of the Company's discriminatory practices. They are entitled to be made whole and the court knows of no reason to deny back pay relief in this case. Albemarle Paper Co. v. Moody, supra. Plaintiffs and the class should also receive front pay -- future pay at the rate of the positions they were wrongfully denied -- until they are placed in a job of equal or higher pay. Patterson v. American Tobacco Co., 535 F.2d 257, 269 (4th Cir. 1976).

23. Plaintiffs and the class are also entitled to injunctive relief, enjoining the

Company for continuing racially discriminatory hiring practices, including Sales and supervisory positions, from administering the seniority provisions of the Collective Bargaining Agreement in a racially discriminatory manner, from denying equal terms, status and conditions of employment to blacks employed as supervisors and from retaliating against or harassing or intimidating black employees who seek to exercise rights under Title VII. Franks v. Bowman Transportation Co., supra; Barnett v. W. T. Grant Co., supra.

24. Class members who have been denied employment in Sales and supervisory positions are entitled to injunctive relief directing that they be placed in such positions at the first appropriate vacancy. Franks v. Bowman Transportation Co., supra, at 267-269, Rather, class members will be awarded front pay until they can be placed in their rightful position. Ibid.

25. Since the court has found class discrimination in hiring in supervisory and Sales positions, class members are presumptively entitled to back and front pay and an order directing that they be employed at the next vacancy. In order to demonstrate individual entitlement, a class member need only show that he or she is a member of the class who actively sought or would have sought[37] employment in Sales or as a supervisor and provide, at the relief stage of this proceeding, information regarding his or her loss of income. Teamsters, supra, 361-371; Sledge v. J. P. Stevens & Co., supra, at 637-638.

26. Plaintiffs and several class members testified at trial. These individuals have established their entitlement to relief. Holsey and Frazier are entitled to injunctive relief and loss of pay for the time they were unable to work while employees junior in seniority to them were allowed to work in

Sausage in 1974 for Holsey and Frazier and 1975 and 1976 for Holsey. Drakeford is entitled to injunctive relief, including an order directing his reinstatement as supervisor free of the discriminatory conditions and for back pay as a supervisor from July 30, 1973 through February 28, 1977, the date of his employment as a supervisor and from November 28, 1978 until he is reinstated. He is also entitled to loss of pay as a salesman from 1975 until he is employed in Sales but any recovery for loss of pay as a salesman must be offset by any recovery for loss of pay as a supervisor. Bennett and Hill are entitled to injunctive relief, including the seniority date they should have received but for the discrimination, and to back pay from June, 1971, through the present for any day they lost pay while employees hired after Bennett and Hill in Sausage were allowed to work. Edwards is entitled to injunctive relief, including an order directing that he

be employed as a supervisor in production at the next vacancy and to back and front pay from July 30, 1973, until he is so employed. Harvey is entitled to injunctive relief, including an order directing that she be employed in Sales at the next vacancy, and to back and front pay as a salesperson from 1975 until she is employed in Sales.

27. A master will be appointed with appropriate instructions to recommend the exact individual relief to which the plaintiffs and the class members are entitled. UTU v. Norfolk & Western Ry. Co., 532 F.2d 336 (4th Cir. 1975); Sledge v. J. P. Stevens & Co., supra.

28. Plaintiffs, as prevailing parties, are entitled to their costs, expenses and reasonable attorney fees. 42 U.S.C. Section 2000e-5(k); Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); 42 U.S.C. Section 1988.

29. This publication looks a lot prettier than the previous edition of March 15, 1981, because it was done as my secretary's first effort on an IBM Displaywriter System, and it does not have as many marks on it. In substance, however, it is the same thing that was originally filed and, like the March 15, 1981 original, it is faithful to the evidence and to the law as understood by the court, and to the merits of the case.

This the (28) day of January, 1983.

S/James B. McMillan
James B. McMillan
United States District
Judge

Footnotes

1 With a merger following the filing of this action, the name of the Union was changed to United Food and Commercial Workers International Union, AFL-CIO, and Local 525, United Food and Commercial Workers International Union, AFL-CIO. See Order of July 2, 1979.

2 The court found "very little indication in the record that defendant unions might be liable under any theory" but felt that outright dismissal would be "inappropriate at this preliminary stage."

On May 22, 1979, the court denied the Company's motion for reconsideration of the class certification order and for certification of the order for appeal under 28 U.S.C. Section 1292(b). The court found that the evidence amply supported the order and that certification under Section 1292(b) would not "materially advance the conduct of the action." Additionally, the court found no irreparable injury to defendant since the court would again consider the conditional class certification following the hearing on the merits which was to take place within a few months.

3 By order of February 9, 1979, the court partially allowed the company's motion to dismiss. The individual claims of intervenor Bennett based on 42 U.S.C. Section 1981 were dismissed as untimely. However, the other motions of the Company to dismiss and for partial summary judgment were denied. Pending or renewed motions of the defendants will be disposed of herein.

3b Defendant contends that Virginia Davis, a black female employed in the office as a telephone clerk between December 27, 1976, and February 12, 1977, was the first black employed with sales responsibilities. However, defendant's officials testified to the contrary, stating that Ennis Graves was the first black to be hired as a salesman (App. at 379, 386). Graves was hired into sales on August 1, 1977, five months after the institution of this suit. In light of the testimony of defendant's officials, the court finds that Virginia Davis did not have sales responsibilities, but had only clerical responsibilities (App. 333-334, 386).

4 The Company strenuously denied that Holsey was discouraged from bidding to promote in Beef or that he was harassed after doing so. The court has carefully reviewed the conflicting testimony and documentary evidence and resolves this controversy in favor of the plaintiff. Defendant's denials and explanation simply are not credible.

5 Much of the evidence in this proceedings is in conflict and requires a determination by the court of whose testimony or exhibits to believe. See footnote 4, supra. Defendant's justification for limiting Holsey's bumping rights to Operations is based exclusively on the testimony of Paul Gibson, the manager of Operations. The court has carefully reviewed Mr. Gibson's testimony and demeanor as well as the documentary evidence and finds the explanation offered by Mr. Gibson to be unreliable and inconsistent with the documentary evidence, including the collective bargaining agreements, the

seniority rosters, the daily work force contingents and the Company's exhibits.

6 Phifer is black. He was not active like Holsey, however, in challenging the Company's discriminatory practices. In restricting Holsey's bumping rights, the Company was following a consistent patter of retaliation against Holsey because of his efforts.

7 "Employees working as temporary replacements hired on a day-to-day basis . . . are not subject to bumping. As a matter of clarification an employee hired as a temporary replacement in his own department is to be laid off in preference to employees who have bumped into this department when the need for temporary replacement no longer exists" (Plaintiffs Exhibit 22E, Collective Bargaining Agreement for 1973-76, p. 74).

8 Holsey was advised that he could bump junior employees in Operations. The same opportunity was extended to Bowen, a white employee. However, Holsey preferred to transfer to Sausage because the work was not as physically demanding and he had suffered an injury to his back. Moreover the Collective Bargaining Agreement gave Holsey the right to bump junior employees in Sausage. The fact that Bowen was physically able to work in the Operations department and was given the opportunity to do so is not relevant to Holsey's claim that he had a right under the contract to bump into the Sausage department and was discriminatorily denied the opportunity to do so.

9 See footnote 5, supra.

10 M. G. Brown, T. M. Harris, S. A. Long, J. H. Ortwein, R. Q. Roof, J. W. Rose and N. H. Thummel

11 Drakeford was hired to replace Gary McClellan, a white supervisor on the day shift.

12 Drakeford's testimony with respect to his treatment after promotion to supervisor was also disputed by the Company. The court has reviewed the documentary evidence and the conduct and testimony of the parties and finds Drakeford's testimony much more creditable.

13 Between 1965 and 1977, 64 employees worked in Sales; 32 of them came from within the Company's labor force. Eighteen of the 32 were initially hired as operatives; 11 of those moved directly from operative positions into Sales (Trial Transcript, pp. 543-545).

14 This finding is based on the analyses and testimony of plaintiffs' consultant (Trial Transcript, pp. 540-570). The Company has selected salespersons externally and internally (50% of the 64 employees working in Sales since 1965 have promoted from within). Some have had prior sales experience -- 18 of 32 hired from the external market; others, however, have had no prior sales experience (Plaintiffs' Exhibit 81d). Based on the Company's hiring practices and considering the employment of blacks in Sales from the 1970 Census and the North Carolina Employment Security data, the court finds and adopts the internal and external availability studies of plaintiffs' consultant.

The Company challenges plaintiffs' availability data and contends that its consultants' estimates of approximately 10% availability is more reliable. The Company's study, however, is based on a static work force of employees as of December 31, 1977, with no consideration of the qualifications or work experience of employees selected by the Company. The court has also evaluated the manner and decorum of the witnesses and finds the plaintiffs' availability and utilization data more reliable.

14a See Trial Transcript, p. 822:

"COURT: What were you telling us all about the feeble nature of Edwards' Asheville time for this morning?
"A: You asked me what I was telling him, sir, about Edwards' what?
"COURT: The gist of what you said this morning was that his time in Asheville didn't count for much because that wasn't unionized and that was one reason you picked Roof (a white employee).
"A: The crux of my conversation this morning, sir, was in fact that Linwood (Edwards) came from a real small unit, very few employees, and it was not under a master labor agreement contract.
"COURT: Where did Roof come from:"
"A: He was originally hired into Charlotte, sir.
"COURT: So you decided against Edwards because he'd only had two more years of unionized plant than Roof, is that the gist of what you said, plus all the time he had at the non-unionized plant?
"A: That could be taken from what I said, yes.
"COURT: Doesn't make much sense, does it?
"A: No, sir, it doesn't."

15 At least until 1973 or 1974, defendant designated certain job positions in production as "A" jobs limited to men, "B" job positions limited to women and "C" job positions open to both men and women. Bennett was assigned to a "B" job (Trial Transcript, pp. 82-83).

16 Ann Long, Ruth English, Peggy Hicks.

17 The Company's consultant indicated that although small, the sample indicated no discrimination. For the reasons stated in footnote 14, supra, the Court is unable to accept this testimony.

18 In certifying the class, see order of May 1, 1979, the Court found that the Company employed between forty and sixty black employees during each of the years since 1971. "The exact number of black applicants for employment is uncertain, but
appears to be in excess of twenty. The Court finds that joinder of all class members would be impracticable." The court reaffirms this finding as well as others made in the May 1, 1979 order.

19 Again, the Company's consultant challenges this position, indicating that the data suggest no discrimination. For the reasons stated in footnote 14, supra, the court does not accept that testimony.

20 See footnote 18, supra.

21 Company records indicate that Hill established seniority on December 20, 1971.
The court finds Hill's testimony more reliable. Hill was unable to work on a regular basis until after Bennett filed her charge in January 1972, although junior white employees, who established seniority

in December 1971, were allowed to work through March 1972. Additionally, the Company's records are not consistent on seniority dates. Some, for example, show that employees established seniority on the
date of hire, without working thirty days as required by the Collective Bargaining Agreement. Others show seniority dates thirty or more days after hire. Moreover, the Company's records show that junior white employees were able to establish seniority before Hill (Trial Transcript, pp. 819-820).

22a See footnote 14a, supra.

23 See, for example, Trial Transcript, p. 666 (witness does not know whether white employees allowed to work in preference to Mynell Bennett and Janie Hill performed better than Bennett and Hill); p. 696 (witness does not know whether white employees in Sausage who were junior in seniority to Holsey were on layoff during the time Holsey attempted to bump into Sausage so as to justify the Company's refusal to allow Holsey to bump into Sausage); p. 720 (witness made a mistake in stating that Holsey forfeited his bumping rights); p. 794 (witness cannot explain why Holsey was not allowed to bump into Sausage as of February 24, 1976, or thereafter); p. 820 (witness cannot explain why white employees hired after Janie Hill were allowed to establish seniority before Hill); p. 837 (witness did not check to see if Drakeford continued to be harassed after complaining). See also Trial Transcript at pp. 160-166 (witness did not talk to black employees about interest in Sales or supervisory positions until after charges were filed with EEOC although the Company followed a practice of inquiring of white

employees and selecting them for such positions without initial applications; witness cannot explain total exclusion of blacks from Sales and supervisory positions); pp. 208-215 (witness cannot explain exclusion of blacks from sales although he hired ten salesmen between 1973 and 1979; he interviewed at least one black and doesn't know why he was not hired); p. 244 (witness did not compare whites he hired in Sales with black applicants).

24 "A" jobs were limited to men; "B" jobs were limited to women; and "C" jobs were for either sex.

25 No sex claim is raised here as this practice was eliminated in 1973 or 1974 (see Trial Transcript, pp. 82-83).

26 A new employee under the Collective Bargaining Agreement was required to work thirty days during a consecutive sixty-day period in order to establish seniority. Plaintiffs do not challenge this seniority provision.

27 See, e.g., paragraphs 14 and 19, infra.

28 "It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he had made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under
this subchapter."

29 The 1976 Collective Bargaining Agreement changed the time period to one year. The seniority provisions are not being

challenged here; rather, plaintiffs contend that they were administered by the Company in a racially discriminatory manner.

30 Appendix I to 1973-76 Collective Bargaining Agreement sets out the bumping procedures as follows:

APPENDIX I
PROCEDURE FOR ADMINISTERING
SECTION 15.7

In administering the procedures for handling displacement rights for employees under Section 15.7, the parties seek to achieve the following basic objectives:

(A) Displacements under the bumping procedure shall be limited to one day per week.

(B) Employees who exercise displacement rights shall be assigned by management to jobs which can be performed with a minimum training period in order to reduce potential disqualifications.

(C) Employees who are displaced under the changed procedure shall be those employees on the active payroll having the least amount of continuous company service.

The procedure for accomplishing these objectives shall be as follows:

(1) Local plant management must decide no later than Thursday noon of each week the levels of production they wish to maintain for the following week. The production departments

and the employment office are to be given this information (by a person designated this responsibility by the local Plant Manager) no later than Thursday noon in order that they can properly plan adjustments in their gangs in the plant departments and determine the employees who are to be laid off as a result of gang reductions as well as those employees to be recalled from layoff for any gang increases. The advance planning required under this procedure is the key to successful handling of the bumping procedure.

(2) As soon as the employment office determines employees who are to be laid off, such employees are to be notified by written notice on Thursday afternoon of their layoff and of the date on which it becomes effective. The department release form for layoffs contains instructions to employees with more than 5 years continuous service who may be entitled to bumping rights in other departments. Such employees who desire to exercise displacement rights will be required to register at the employment office Thursday after completing their day's work and no later than the time to be designated by the local plant for closing of the bumping register on Friday.

The register form provides space for the employee to designate his preference (first, second and third) for exercising displacement rights

in departments where the employees with the least amount of service are working. The employment office is to have available a list of such departments for review on the part of the displacing employees at the time they appear to register.

(3) Immediately after the closing of the bumping register and prior to the end of the work day on Friday the employment department will make assignments to the registered employees in the order of continuous service, giving preference to the choices indicated by the employee. When two or more employees indicate the same preference of departments, the employee with the longest service is to be given his first choice unless there are extenuating circumstances (such as physical requirements of the job to be performed) preventing such assignment.

In Section 15.7(a)(2), it is stated that the Employment Office will proceed to assign registered employees to departments in the order of their continuous service and whenever possible in accordance with the preference indicated by the employee. Deviations from this rule are to be made in cases such as situations where the choices of departments indicated by the employees no longer exist because of the fact that longer service employees who have registered have already exercised their right and received assignments to such jobs.

Employees with the least amount of company service being displaced by the registered employees are to be notified of their layoffs preferably before they leave work on the last scheduled work day of their work week. If it is not physically possible to do so they must be notified by telegram prior to the first work day of the following week. Employees who have registered for displacement rights are to be required to stop at the employment office on their way home from work Friday in order to pick up their starting tickets for their new assignments. Actual displacement in these cases becomes effective as of the first work day of the work week immediately following their layoff.

(4) Employees who are not working on the day of their layoff and who may be eligible for displacement rights are to be notified of their layoff by wire and will be given the same opportunity to exercise displacement rights as those employees who are working, provided such employees notify the employment office of their desire and register at the employment office on Friday to receive their new assignment. This consideration is to be given to employees who are absent for legitimate reasons, such as vacations, sick leave, injury, or leaves of absence which have been authorized by management.

Local Union officers or bargaining committee members who are on approved leave of absence for the

purpose of conducting Union business away from their plant City at the time of layoff, shall in the week in which they return to work be given preference on any job openings which may occur under Section 15.6 and will be given an opportunity to register for displacement rights on Thursday and Friday of that week.

(5) Employees who are eligible to exercise displacement rights but who do not register for such rights in accordance with the procedure outlined in the foregoing and employees who are disqualified after bumping into a department shall again be permitted to exercise their rights by notifying the employment office and registering for their new assignments no later than Wednesday preceding the week in which they desire to displace. Employees who fail to obtain employment within a 60 calendar day period following their layoff or date of disqualification, as the case may be, shall not again be eligible to further displacement rights until they have been recalled in line of seniority in their own departments or hired under the provisions of Section 15.6 and subsequently laid off. Employees who are unable to obtain employment under this procedure because no other employee with less service is working during the 60 calendar day period may be granted a second 60 day period in which to exercise displacement rights provided they request such extension prior to the end of the first 60 calendar days of layoff.

Employees who are laid off and have more than 5 years of service and who are physically disabled for any or all of the 60 calendar day period shall be entitled to exercise displacement rights within a two week period following the date of their recovery or the end of the 60 day period, whichever occurs later.

Employees who accept their new assignments under this displacement procedure but without good cause fail to report as scheduled or voluntarily quit a job after bumping in on it shall not again be eligible to exercise their rights until they have been recalled in their own seniority departments and subsequently laid off. This, however, shall not disqualify such employees under Section 15.6.

(6) In some plants it may be desirable due to peculiar circumstances to set a limitation on the number of employees who may be bumped into a department in any one week. Limitations in this area are permissible provided they can be arrived at by agreement in writing with the local bargaining committee. If serious disruptions are feared in this connection, the local plant must notify the home office since the International Office of the Union has agreed to cooperate in working out such problems.

(7) The policy of assigning the person exercising bumping rights to the job of the employee being bumped is no

longer required. In changing this policy it shall be the practice to assign displacing employees to the least skill jobs in the department.

Rearrangement of regular employees remaining in the department in order to fill the jobs vacated by employees being displaced shall be made in accordance with past practice for filling temporary vacancies. (In filling the jobs of such displaced employees, however, you are not to recall employees in line with departmental seniority and instead make assignments to these jobs from regular employees who are working.) If no one in the department is capable of performing such vacated jobs, it will be necessary to train the next employee in line with seniority from those who are on the payroll at that time.

In the event of future bumping into the department under this procedure there will be a trained senior employee available for assignment to the highly skilled job and the problem of training in the future will be minimized. In the event of such training, employees will be given a reasonable time in which to learn the job under circumstances which would be considered normal for such training in promoting employees within the department in situations other than those arising out of displacement.

Job assignments within the departments which are affected by the displacement procedures must be made on

a fair and equitable basis and without discrimination.

(8) The practice of bypassing certain jobs is to be discontinued and employees having the least amount of company service are the ones who must be laid off as a result of the displacement procedure. Examples of cases where bypassing may be the exception are: (a) a mechanical department where all of the employees in the department have refused to promote to a skilled job they consider undesirable. Exceptions to this rule will be granted only in rare circumstances with home office approval and then only after local management has completely justified their position in bypassing any job. In all cases where bypassing takes place, the supervisor must immediately start training another employee from his department seniority list to fill the job.

(9) Employees working as temporary replacements hired on a day-to-day basis under the new procedure are not subject to bumping. As a matter of clarification an employee hired as a temporary replacement in his own department is to be laid off in preference to employees who have bumped into this department when the need for temporary replacement no longer exists.

(10) Any written local agreements which are consistent with these changes in policy may be continued without change. Any deviation from the new policy must have home office

approval. The objective in establishing the new policy is to make the procedure uniform throughout all plants and to hold deviations to an absolute minimum.

(11) Employees who displace and fail to report as scheduled or fail to perform properly due to deliberate action on their part shall be subject to disciplinary action. Prior to taking disciplinary action in such cases, management must advise the Local Union committee of the problem and discuss it with them.

(12) Employees who accept assignments under this procedure will be given six months temporary department seniority in the department in which the displacement takes place. Such employees must, when recalled, return to their original seniority department or forfeit that seniority and hold seniority in the new department only from the date hired in the new department. Employees who do not elect to follow the displacement procedure may still apply for employment under the provisions of Section 15.6.

Employees, who after registering fail to accept the assignment given them by the employment office, shall have no further displacement rights until they are recalled to their own seniority department and subsequently laid off. In such cases, however, the employee whom they would have displaced, had they accepted their assignment, is to be laid off and replaced with a

temporary replacement. In such cases the temporary replacement may be the employee who is laid off from the department. These cases will usually occur when the employees having the least continuous service are working in departments considered to be undesirable on the part of most employees. In these cases the Union may be instrumental in convincing employees to accept their assignments and if this occurs and the employee involved remains on his assignment for at least a one week period and then voluntarily quits he shall not be deprived of further displacement rights within a 60 day period following the date of his quitting. (Emphasis in original).

31 List of employees with 5 or more years of Company employment who had registered with the Company to exercise bumping rights. See Appendix I(2), supra, footnote 30.

32 Appendix I(9), supra, footnote 30.

33 See text at footnotes 5 and 23, supra.

34 See findings of fact 19, supra.

35 See findings of fact 15.

36 See Trial Transcript, pp. 814-815; Plaintiffs' Exhibit 28B.

37 Non-applicants have the heavy burden of demonstrating that but for the Company's pervasive practice of excluding blacks from supervisory and sales positions, they would have sought such employment,

were available and were qualified for the positions. Teamsters, supra at 367-371 and n. 53.

Curtis HOLSEY, Jackie L. Drakeford,
Julius Frazier, Mynell Bennett,
Linwood Edwards, Laura Harvey,
Janie Hill, Appellees,

v.

ARMOUR & COMPANY, Appellant.
No. 83-1428.
United States Court of Appeals,
Fourth Circuit.
Argued Oct. 3, 1983.
Decided Aug. 20, 1984.
As Corrected September 13, 1984.

Before ERVIN and CHAPMAN, Circuit Judges, and BUTZNER, Senior Circuit Judge.

BUTZNER, Senior Circuit Judge:

Armour & Company appeals from a judgment of the district court entered upon findings that the company had discriminated against black persons in violation of 42 U.S.C. § 1981 and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e et seq.

Armour's 20 assignments of error encompass virtually every provision of the court's judgment, which afforded both

individual and class relief.

This case is before us for the second time, and we now decide:

1) The district court complied with our mandate on remand.

2) The district court did not err in allowing certain class members to intervene and in adjudicating their claims in the first stage of the bifurcated trial.

3) The provisions of the judgment pertaining to discrimination and retaliation in violation of §§ 703(a) and 704(a) of Title VII, 42 U.S.C. § 2000e-2(a) and § 2000e-3(a) against the individual complainants are affirmed with the exception of those concerning Laura E. Harvey's claims about overtime work and switchboard training.

4) The class certification is vacated to the extent that it includes

applicants affected by Armour's hiring practices and employees who sought promotion to office and management positions other than sales representatives and supervisors. In all other respects, the class certification is affirmed.

5) The findings of a pattern and practice of discrimination because of race with regard to promotions into sales and supervisory positions, and of retaliation in violation of § 704(a) are not clearly erroneous.

6) Relief granted Curtis Holsey and Julius Frazier must be modified to allow them retroactive departmental seniority based on their transfer date and not their date of hire. Injunctive relief granted incumbent employees who applied for positions other than sales or supervisory jobs

is vacated. Relief granted job applicants is vacated. All other relief granted individual complainants and the class is affirmed.

7) The award of attorneys' fees is vacated and remanded to the district court for reconsideration.

I

Curtis Holsey, Jackie L. Drakeford, and Julius Frazier filed charges with the Equal Employment Opportunity Commission, received right-to-sue letters, and timely commenced this class action against Armour, the Meat Cutters Union, and its Local 525. They alleged that the defendants' policies and practices had discriminated against them and the class members in hiring, promotions, layoffs, recalls, and other terms of employment because of their race.

The district court allowed Mynell Bennett to intervene as a plaintiff before trial. Bennett had filed a charge with the commission alleging discriminatory discharge and maintenance of racially separate jobs. She received a right-to-sue letter and timely moved for leave to intervene.

The district court certified a class. It held that Armour had discriminated against the complainants and the class because of their race in violation of § 703(a) and that it had retaliated against them in violation of § 704(a). It granted individual and class relief and awarded counsel fees. The court dismissed the claims against the union. Before entry of judgment, three class members who had presented claims at the trial moved to intervene as plaintiffs, and their motions were granted.

Armour appealed. We vacated the judgment with instructions to reconsider the findings of fact and conclusions of law and to clarify

the allocation of evidentiary burdens in light of the Supreme Court's intervening decision in Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L.Ed2d 207 (1981). Holsey v. Armour & Co., 683 F.2d 864 (4th Cir. 1982). After conducting proceedings on remand, the district court entered an amended judgment from which Armour now appeals.

II

Before turning to the merits of this appeal, we address Armour's contention that the district court did not follow our mandate.

On remand, the district court conducted a hearing at which the plaintiffs proposed changes and responded to factual contentions that Armour had made on appeal. Armour had no specific proposals at the time, except a request that all adverse findings be reversed as error. The district court then directed

both parties to file specific proposals for changes in the findings of fact, conclusions of law, and the judgment. The parties submitted lengthy responses which the court considered before it entered its amended judgment. After re-examining its findings of fact and conclusions of law, the court adopted suggestions from both parties where it found the changes were consistent with its opinion and accurate with respect to the evidence.

We conclude that the district court has complied with our mandate and its findings are demonstratively the result of the court's independent judgment. Also, the record establishes that the district court placed the burden of proof on the complainants in accordance with United States Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 75 L.Ed.2d 403 (1983), and Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S.Ct. 1089, 67 L.ED.2d 207 (1981).

III

The district court found the following background facts about the company's business. Armour has operated a meat processing facility in Charlotte, North Carolina, since 1958. There are four production departments at the plant: a beef department, responsible for fabrication of beef; a sausage department, responsible for production of processed meats; a maintenance department, responsible for vehicle repairs and maintenance of equipment; and, an operations department, responsible for the distribution of products. In addition, the facility has office employees, including sales representatives.

Employees in the four production departments are represented by a union, which entered into collective bargaining agreements that establish seniority rights. Seniority governs job progression, daily replacement work, temporary and permanent layoff, and

recall rights.[1]

Armour increased its production work force between 1969 and 1973 from approximately 90 to over 200 employees. Since 1974, however, sales have declined and the production work force has been cut back. In March 1980, when this case was tried, there were 133 production workers, of whom 50 worked regularly.

Armour filled sales and supervisory positions by transferring or promoting incumbent employees or by hiring new employees. Armour does not post vacancies or publish selection criteria for these jobs. The personnel are selected by a white managerial staff, applying subjective standards. Although a number of experienced black employees sought sales or supervisory positions, Armour managers had never compared the qualifications of these black employees with the white employees who were hired.

No black employee worked as a supervisor

before Holsey, Frazier, and Drakeford filed charges with the commission in 1974. No black employee worked as a sales representative until August 1977, more than three years after plaintiffs filed charges with the commission. A company official explained to an employee that Armour did not hire black persons in the sales department because customers would not buy from them.

IV

Contrary to Armour's contention, we conclude that the district court did not abuse its discretion in allowing class members Janie Hill, Linwood L. Edwards, and Laura E. Harvey to intervene after trial and before the entry of judgment. Because Federal Rule of Civil Procedure 24 is silent as to what constitutes a timely application for intervention, the determination is left to the court's discretion. The court must consider all the

circumstances in each case, not just to what point the suit has progressed. NAACP v. New York, 413 U.S. 345, 364-69, 93 S.Ct. 2591, 2602-04, 37 L.Ed.2d 648 (1973). The most important consideration in reviewing the decision is whether the delay prejudiced the parties. See Hill v. Western Electric Co., 672 F.2d 381, 385-87 (4th Cir. 1982).

Intervenors Hill, Edwards, and Harvey were witnesses at trial as well as class members. They suffered from the same practices challenged by the plaintiffs. Armour has not demonstrated any prejudice resulting from the intervenors' metamorphosis from class member witnesses into plaintiffs. See Brown v. Eckerd Drugs, Inc., 663 F.2d 1268, 1278 (4th Cir. 1981), vacated on other grounds, 457 U.S. 1128, 102 S.Ct. 2592, 73 L.Ed.2d 1345 (1982). Whether they were allowed or denied intervention, their testimony was relevant and the court would be justified in making factual findings and

stating conclusions pertaining to the discrimination they depicted.

Armour's second contention regarding the intervenors is that the district court erred in adjudicating their individual claims at the liability stage of the bifurcated trial. The company claims it should be allowed to rebut the individual claims at the second stage of the proceedings, relying on this court's decision in Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625 (4th Cir. 1978).

Armour had a full opportunity to defend against the intervenors' claims, and it introduced evidence in opposition to them. Moreover, at the first stage of the trial, the intervenors met a more rigorous burden of proof than would have been required had they waited until the second stage when they would receive the benefit of a finding of class-wide discrimination. See Sledge, 585 F.2d at 637.

Adjudicating the intervenors' claims at the first stage of the proceedings is not

forbidden by Sledge. On the contrary, that case deals with the consequences of class members who did not litigate their individual claims at the first stage. In Sledge, we held that class members cannot be dismissed for omitting to prove their individual claims at the first stage when they had been led to believe that this would be the subject of the second stage. 585 F.2d at 637-38. Moreover, in Cooper v. Federal Reserve Bank, ____ U.S. ____, ____, 104 S.Ct. 2794, 2802, 81 L.Ed.2d 718 (1984), the Supreme Court held that "[w]hether the issues framed by the named plaintiffs before the court should be expanded to encompass the individual claims of additional class members is a matter of judicial administration that should be decided in the first instance by the district court."

V

Seven employees allege disparate

treatment. Their claims are discussed separately.

Curtis Holsey

The district court found that because of Holsey's race and his efforts to challenge Armour's racial practices, Armour denied him the opportunity to exercise his bumping privileges in the sausage department to avoid lay-offs in the beef department.

The court found the following facts. Holsey was hired by Armour on December 1, 1969, and assigned to the operations department. At the time, black employees were concentrated in operations, and there were no black males in sausage and but one or two black employees in beef. After three weeks, Holsey was transferred to a clean-up job in beef, and subsequently he bid on better jobs in beef. His supervisor discouraged him from bidding on these promotions, but he was

awarded the jobs because of his seniority. He was harassed in his new positions by being assigned duties that were not part of his job, was denied assistance in training and in the performance of his job, and was improperly disciplined. Holsey filed numerous grievances about the harassment, some of which were adjusted by Armour. In 1974, after Armour refused to let him grieve discrimination because of his race, Holsey filed a charge with the commission.

Permanent layoffs occurred in the beef department on three occasions: September 2, 1974; February 26, 1975; and February 24, 1976. The collective bargaining contract allowed employees who were permanently laid off and had five years' company seniority to bump junior employees permanently assigned to other departments, but they could not bump temporary employees. The bumping employee would then have recall rights established in the new department. Holsey had established

five years' seniority on December 1, 1974, and he attempted to bump into the sausage department, establish recall rights there, and avoid further layoff. Armour officials told Holsey that no junior employees were working full time in sausage and that he could bump only junior employees in operations.

There was conflicting evidence as to whether three white and one black employee in sausage, all junior to Holsey, continued to work during the 219 days Holsey was on layoff. The court determined that Armour's explanation was unreliable and inconsistent with the documentary evidence. It found that the four junior employees were not working as "temporary replacements" in sausage. They had, in fact, worked during much of their "layoff." Even if they had been working on a day-to-day basis, Appendix I of the collective bargaining agreement provides that they are to be "laid off in preference to employees who have bumped into this department when the need

for temporary replacement no longer exists." The black employee in sausage who continued to work while Holsey was laid off was not active in challenging Armour's discriminatory practices. This is consistent with Armour's pattern of retaliation against Holsey for his efforts. The court found Armour's explanation for denying Holsey's request to bump into sausage to be pretextual.

Armour contends that a comparison of Holsey's timecards and those of the junior sausage employees dispute Holsey's testimony that these employees worked while he was laid off. The company also offered evidence that he had refused work on occasions and was under medical disability during layoff periods.

The timecards introduced by Armour indicate some of the junior white employees were not working when Holsey was laid off, but these timecards did not cover the entire period Holsey was on layoff. The district court noted in its findings that Holsey was

out 219 days during layoffs in 1974, 1975, and 1976, while the four junior employees were laid off from 82 to 132 days. The district court could infer that at least some junior employees were working part of the time Holsey was on layoff. Similarly, the 53 days Holsey was out on medical disability between July 1975 and January 1976 do not explain why he was disqualified from bumping into sausage when he was available for work. Armour's testimony that Holsey refused work during this period was in dispute. Holsey denied that he had refused. The court weighed the credibility of the witnesses and believed Holsey.

The district court properly considered evidence of Armour's harassment of Holsey before he filed his charge with the commission as probative of the company's racial attitudes. In United Airlines v. Evans, 431 U.S. 553, 558, 97 S.Ct. 1885, 1889, 52 L.Ed.2d 571 (1977), the Supreme Court stated that such

time-barred acts "may constitute relevant background evidence in a proceeding in which the status of a current practice is at issue . . . ."

Also, the district court correctly treated Holsey's claim that he was denied the opportunity to bump junior employees in sausage as disparate treatment. The court's decision does not rest on disparagement of the seniority system. Holsey proved by a preponderance of the evidence that Armour manipulated bumping to deny him and other black employees the privileges accorded by the seniority system in retaliation for their complaints about the company's discriminatory practices.

Julius Frazier

Frazier was hired by Armour on July 21, 1969, and assigned to the operations department. He soon signed a job posting and

was transferred to the beef department, where he worked continuously until the 1973 and 1974 layoffs. In August 1973, he was denied the opportunity to avoid layoff by bumping into sausage. In March 1974, he filed a charge with the commission complaining that he was discriminatorily denied his bumping rights. Frazier was laid off again for two weeks in December 1974 because he was not allowed to bump into sausage, although junior white employees in sausage continued to work. The district court found that Frazier was denied his contractual right to bump into sausage during the two-week period in 1974 because of his race and his efforts to exercise rights under Title VII.[2]

Frazier testified that two junior white employees, maintenance employee Kyle and sausage employee Newman, were allowed to work while he was on layoff. In rebuttal, an Armour official offered the same explanation that was given for denying Holsey an

opportunity to bump into sausage - there were no vacancies.

The district court, noting numerous inconsistencies and conflicting documentary evidence, found Armour's explanations unreliable. Additionally, the district court property considered evidence that Armour had historically limited opportunities for black males to work in sausage and that it harassed black employees who challenged the company's racial practices. Evidence of a general atmosphere of discrimination may be considered with other evidence bearing on motive in deciding whether the plaintiff has met his burden of showing the defendant's articulated reasons are pretexts. Sweeney v. Bd. of Trustees of Keene State College, 604 F.2d 106, 112-13 (1st Cir. 1979). See Furnco Construction Corp. v. Waters, 438 U.S. 567, 580, 98 S.Ct. 2943, 2951, 57 L.Ed.2d 957 (1978).

Jackie L. Drakeford

The district court found that Armour denied Drakeford supervisory and sales positions because of his race. The court also found that after Drakeford was promoted to supervisor, the company denied him equal status with white supervisors and harassed him in other ways, forcing him to terminate his employment in violation of § 704(a) of Title VII.

The court found that Drakeford was hired by Armour on June 17, 1969. Although he told his supervisor and department manager that he was interested in a foreman position in 1973, he was passed over on more than eight occasions between July 1973 and February 28, 1977, by junior white employees. The court noted that Armour had no black supervisor during this period.[3] Indeed, no black had been made a supervisor until Drakeford's promotion in 1977. The court found that

Drakeford was more qualified than the junior white employees because of his seniority, past work performance, and overall experience with Armour.

Armour officials testified that no production employees, black or white, were considered for foreman positions after 1971 when the company instituted a trainee program limited to college graduates. This program was instituted in order to bring in persons who would stay with the company. Of the eight trainees hired between 1971 and 1974, all but two left the company after a short time, including four who were discharged. The remaining two transferred to other jobs at Armour. None of the trainees selected was black.

The court found that the company never validated the criteria for selecting program candidates and terminated the program in 1975 when it became clear that the criteria and program didn't produce the desired results.

Moreover, the record discloses that Armour in 1972 hired a white foreman who was not in the program. Between 1975, when the program was terminated, and 1977, when Drakeford was appointed, there was a foreman vacancy which Armour filled with a white appointee.

The district court also found that Drakeford was denied a sales position in 1975 and thereafter because of his race. The court found that Drakeford had expressed his interest in a sales position to the sales manager in 1975 and was told he would be considered for the next vacancy. Sales jobs are not posted, and an Armour official testified that one way a laborer could move into a salaried job was to talk to a supervisor. Drakeford was never asked to complete an application and did not do so.

Armour had no written standards for hiring sales representatives. An all-white staff selected new sales representatives, applying subjective standards. The district

court found that Drakeford was available and qualified for a sales position, but sales vacancies were filled with white employees with no greater qualifications than Drakeford. Furthermore, no black employee or applicant had been hired as a sales representative until after this action was filed.

Armour's contention that Drakeford's testimony is insufficient to establish a prima facie case because he made only a "casual inquiry" regarding a sales position is refuted by Teamsters v. United States, 431 U.S. 324, 365-67, 97 S.Ct. 1843, 1869-70, 52 L.Ed.2d 396 (1977). There the Supreme Court held that a person who is interested in seeking a position but has not formally applied may be entitled to relief under Title VII. The Court reasoned that an employer's policy of discrimination "can be communicated to potential applicants more subtly but just as clearly by an employer's actual practices - by his consistent discriminatory treatment of actual

applicants, by the manner in which he publicizes vacancies, his recruitment techniques, his response to casual or tentative inquiries, and even by the racial or ethnic composition of that part of his work force from which he has discriminatorily excluded members of minority groups." 431 U.S. at 365, 97 S.Ct. at 1870.

In view of the district court's findings that Armour had no black employees in sales at the time of Drakeford's inquiry and had actively discouraged them from applying for sales jobs, Drakeford's claim is clearly within the Teamsters' standard for nonapplicants.

The district court made the following findings in support of its conclusion that Drakeford was constructively discharged by Armour in violation of § 704(a). Drakeford was promoted to supervisor on February 22, 1977, after filing a charge with the commission and several days before this action

was filed. He was put on a night shift so that a white supervisor could get the day shift, although Drakeford was hired to replace a day-shift supervisor. The shift was adjusted a second time to accommodate another white supervisor. The general foreman at Armour granted leave to employees supervised by Drakeford without advising him. Despite complaints to his superiors, the problem continued. His request for a transfer was rejected by the company. As a result of the degrading treatment, he left Armour on November 28, 1978. The district court found that the company knew Drakeford was denied equal status as a supervisor and was subjected to harassment but failed to correct these practices. It held that "the employment conditions imposed by the company forced Drakeford to terminate his employment in violation of Section 704(a)."

Armour argues that it must be shown that the employer acted with the intent to force

the employee to resign in order to establish constructive discharge. The company claims that there is no evidence that it sought to make Drakeford quit his job.

The elements of a constructive discharge are stated in J. P. Stevens & Co., Inc. v. NLRB, 461 F.2d 490 (4th Cir. 1972), as follows: "Where an employer deliberately makes an employee's working conditions intolerable and thereby forces him to quit his job . . . the employer has constructively discharged the employee . . ." A constructive discharge violates § 704(a) when the record discloses that it was in retaliation for the employee's exercise of rights protected by the Act.

To act deliberately, of course, requires intent. But direct evidence of intent is unnecessary. Circumstantial proof suffices. United States Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 1481 n. 3, 75 L.Ed.2d 403 (1983). The fact that higher

officials knew of Drakeford's untenable position and took no action to correct it supports the district court's finding that the employment condition were "imposed by the company." This finding satisfies the requirement of deliberateness.

The district court's findings also satisfy the other requirements of a constructive discharge in violation of § 704(a). The company refused to appoint Drakeford a supervisor until after he filed a charge with the commission. He was then systematically harassed and denied equal status with white supervisors. The court's finding that these conditions forced him to resign is not clearly erroneous.

Linwood L. Edwards

The district court held that Linwood Edwards was denied a supervisory position because of his race.

The court made the following findings. Edwards was hired by Armour in 1949 at its Asheville facility and subsequently promoted to supervisor. When the plant closed in 1969, Edwards was transferred to the Charlotte plant and assigned as a laborer. Armour's practice had been, and continued to be throughout this litigation, to transfer employees from closed facilities to other facilities in basically the same job position. For example, three white supervisors from closed plants transferred into the Charlotte facility and were brought in as supervisors. Edwards requested a supervisory assignment after his transfer but was passed over for junior white employees who were hired as, or promoted to, supervisors. Armour had no black supervisor until 1977, when Drakeford was promoted after filing his charge with the commission. Edwards had the experience and knowledge of Armour's operation to qualify him for a supervisory position at the time he was

transferred to Charlotte and when job vacancies occurred between 1971 and the trial.

Armour contends that the court ignored the legitimate nondiscriminatory reasons it offered and that the finding of pretext is clearly erroneous.

On the contrary, the court's findings of fact specifically addressed the testimony of Armour officials and found that the explanations were not credible. One reason offered by an official for not promoting Edwards was that his supervisory experience in Asheville occurred in a nonunion plant and the Charlotte plant was unionized. The company, however, continued to bypass him in favor of junior white employees with little or no union experience even after Edwards had accumulated several years union experience at Charlotte. The official also testified that Edwards wasn't offered a supervisory position because he didn't think he would have taken it. Finally, he testified that Edwards was not

selected because of his "interation within the plant, his ability to communicate, take instruction," and because he lacked aggressiveness. The district court found that Edward's satisfactory performance as a supervisor in Asheville showed that this "after-the-fact" explanation was false.

Mynell Bennett

The district court found that Armour prevented Bennett from acquiring seniority because of her race and that Armour discharged her in violation of § 704(a). Armour contends that these conclusions are clearly erroneous and that Bennett's claim is barred by laches.

The court made the following findings of fact. According to the collective bargaining agreement in effect in 1971, a new employee was classified as a probationary employee until he or she worked 30 days during a consecutive 60-day period. At that time the

employee acquired a permanent status, with seniority and its concomitant rights. Probationary employees were called in to work on a daily or weekly basis when needed by a supervisor. Although no standards governed the supervisors' discretion in calling probationers to work, the practice was to call in the most senior employee.

Bennett started working in Armour's sausage department as a probationary employee in July 1971. In August, Armour hired three white women from the closed Swift & Company plant. These women, although junior to Bennett, were called in over her. Armour also employed white students to work during the summer, at the same time Bennett was trying to establish seniority. As a result, Bennett was unable to acquire permanent status after six months of probationary employment.

In January 1972, Bennett asked her supervisor if the company had refused to call her to work because of her race or her

performance. The supervisor assured her that her performance was acceptable, but after the conversation she was not called to work. Two weeks later, upon inquiry, she was told she had been discharged.

The court found that Bennett was qualified to perform the work and that the junior white employees were called in over her because of her race. It also found that she was discharged in retaliation for complaining about Armour's discriminatory refusal to call her to work and because of her race.

Armour claims that the probationary employees from Swift were called in over Bennett because their experience at Swift and their familiarity with the machines in the sausage department was of value to the company. The court specifically found this explanation not credible. According to an Armour official, an employee hired into the company from Swift would not be given any preference over employees already working at

Armour. The official also testified that probationary employees were evaluated during the probationary period by a subjective determination on the part of their supervisor. No written or objective comparison between the Swift employees and incumbent Armour employees was made.

The court's finding that Armour discharged Bennett in retaliation for her inquiry as to whether she was not called to work because of her race is supported by testimony and documentary evidence. When Bennett made the inquiry in January 1972, she was assured by her supervisor that her work was satisfactory. Documents in her personnel file support this evaluation. After Bennett made her complaint, she was never called in again and was fired with no explanation. In a North Carolina Employment Security Commission form completed by Armour, the company indicated that she was discharged in January 1972 for unsatisfactory performance. The

court correctly concluded that the discharge was a violation of the § 704(a) "opposition clause." Bennett's inquiry as to whether she had been prevented from acquiring seniority because of her race constitutes opposition under the statute. See Berg v. La Crosse Cooler Co., 612 F.2d 1041 (7th Cir. 1980).

Finally, Armour contends that Bennett's claims are barred by laches because she waited four and a half years before bringing suit, and the company was prejudiced because Bennett's supervisor had died before trial. Bennett filed a charge with the commission on January 27, 1972. The commission investigated the charge and on August 25, 1976, issued a determination of reasonable cause. When conciliation efforts failed, Bennett received a right-to-sue letter on May 17, 1977. Bennett then moved to intervene in this proceeding on June 2, 1977.

In order to apply laches, there must be a finding that the plaintiff delayed inexcusably

in filing suit and that the delay resulted in undue prejudice to the defendants. We hold that Bennett's decision to rely on the commission's administrative process before initiating a private suit is not inexcusable delay. See Bernard v. Gulf Oil Co., 596 F.2d 1249, 1256-58 (1979), adopted, 619 F.2d 459, 463 (5th Cir. 1980) (en banc).

Janie Hill

The district court found that Hill was denied the opportunity to establish seniority because of race.

In addition to the findings described under Bennett's claims, the court made the following findings of fact. Hill was hired by Armour in 1971 as a probationary employee in the sausage department. She was passed over for work in favor of junior white employees, including the three women who had been hired from Swift. As a result, Hill was unable to

acquire permanent status and seniority until March 1972, after the junior white employees from Swift had established seniority. Armour's assertion that the Swift employees were more efficient than Hill was not credible, given the company's lack of objective measures of efficiency, its official's testimony that the Swift employees wouldn't be given preference over incumbent employees, and Hill's satisfactory performance at Armour. The district court credited Hill's testimony and found that the company intentionally discriminated against her because of her race.

Armour contends that the court's conclusion is clearly erroneous because the evidence demonstrates that no racial motive was involved in its decision to call certain junior white employees over Hill. The existence of discriminatory intent, according to Armour, is belied by the fact that black employees sometimes acquired seniority

immediately and white employees sometimes took a year to acquire seniority.

Armour's argument does not expose any error in the district court's judgment. The district court's findings of intentional discrimination were not based on a comparison of the length of time black and white employees remained probationers. The findings were based on the fact that the probationary periods of Bennett and Hill were unlawfully extended because when Armour assigned work, it favored junior white employees with no superior qualifications.

Laura E. Harvey

The district court held that Armour discriminated against Harvey in violation of § 703(a) by depriving her of equal status in her supervisory position. The company also denied her a sales position because of her race, and, when she complained about Armour's

racial practices, she was harassed in violation of § 704(a).

The court made the following findings of fact. Harvey was hired by Armour as a keypunch operator in January 1973. She was the first black employee in data processing and only the second ever employed in the administrative office. In 1979, she was promoted to a supervisory position, replacing a white employee as lead key operator. Despite the fact that her predecessor had supervised both black and white employees, Harvey was told that the white employees would be supervised by the data processing manager because they would not take instructions from her. In March 1979, Harvey resigned because this arrangement created problems with work assignments among the employees. In May 1979, she returned to work as lead key punch operator but without supervisory duties.

The district court properly concluded that Armour violated Title VII by preventing

Harvey from supervising white employees because they did not wish to take orders from a black person. Section 703(a)(2) provides that it shall be an unlawful employment practice for an employer "to limit, segregate, or classify his employees . . . in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race . . . ." Racial segregation of the employees Harvey supervised because of her race limited her employment opportunities as a supervisor and adversely affected her status. Cf. Rogers v. EEOC, 454 F.2d 234, 237-38 (5th Cir. 1971); Allen v. City of Mobile, 331 F.Supp. 1134, 1144 (S.D.Ala. 1971).

In regard to the claim pertaining to a sales position, the district court found that Harvey applied for sales jobs in 1976, 1977, and 1978. The court found that Harvey was qualified to work in sales. She was highly

recommended by her supervisor for her attitude, motivation, and performance. In a 1977 performance evaluation, her supervisor noted that her sales knowledge was underutilized. The court found that Armour had rejected Harvey for sales because of her race. Despite Armour's explanation that there were few sales openings from 1976 to 1978 and, in most cases, jobs were awarded to persons with significant prior sales experience, the court found convincing Harvey's evidence that the company had a practice of excluding blacks from sales jobs. Harvey's supervisor told her the company didn't hire black salespersons because the customers wouldn't buy from them. An Armour official who participated in hiring sales employees between 1975 and 1978 testified that a high school education was the only established criterion for hiring sales persons. Harvey had a high school diploma as well as the sales knowledge and other attributes noted in her performance

evaluation. In the face of evidence that the company did not hire black sales representatives, Armour's rebuttal on the basis of relative qualifications does not demonstrate that the district court's findings are clearly erroneous. See EEOC v. Ford Motor Co., 645 F.2d 183, 188 n. 3 (4th Cir. 1981), rev'd in part on other grounds, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982).

There is one aspect of Harvey's claim that is not supported by the record. The evidence does not disclose that Armour violated § 704(a) by retaliating against her because of her complaint. She was not assigned overtime work or denied switchboard training in retaliation or because of her race. There is no evidence that any white employee requested the switchboard training and received it. There was only one switchboard position at Armour, and it was occupied by a white woman who was hired the same year as Harvey and remained in the

position at the time of trial.

Consequently, we vacate that portion of the district court's judgment dealing with Harvey's complaint about overtime work and switchboard training. Because the findings about these claims were not necessary to the findings that Armour discriminatorily denied Harvey equal supervisory status and a sales position because of her race, affirmance of those claims is not affected.

Summary

With respect to a disparate treatment claim, United States Postal Service v. Aikens, 460 U.S. 711, 103 S.Ct. 1478, 1482, 75 L.Ed.2d 403 (1983), reiterates:

> The "factual inquiry" in a Title VII case is "whether the defendant intentionally discriminated against the plaintiff." . . . In other words, is "the employer . . . treating 'some people less favorably than others because of their race, color, religion, sex, or national origin.'"

Thus, when the evidence introduced by both the employee and the employer has been admitted, the ultimate question is "whether the [employer] intentionally discriminated against the [employee]." 103 S.Ct. at 1482. The burden of proving intentional discrimination is on the employee. As in any other case, intent, a state of mind, is a fact that can be proved by indirect or circumstantial evidence. 103 S.Ct. at 1482-83. A district court's finding of intentional discrimination on account of race, or lack of this discrimination, is encompassed by Federal Rule of Civil Procedure 52(a). A court of appeals is obliged to accept the finding unless it is clearly erroneous. Pullman-Standard v. Swint, 456 U.S. 273, 287, 102 S.Ct. 1781, 1789, 72 L.Ed.2d 66 (1982). "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed."

United States v. United States Gypsum Co., 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746 (1948).

These precepts have governed our review of the district court's findings about the seven individual claimants. With the exception of Harvey's overtime and switchboard claims, we conclude that the district court's findings that Armour intentionally discriminated against the complainants because of their race are not clearly erroneous. We also conclude that the court's findings of retaliation in violation of § 704(a) are not clearly erroneous. The provisions of the judgment pertaining to the individual claims, except as noted above, are affirmed.

VI

Armour assigns error to the district court's judgment pertaining to the class on both substantive and procedural grounds.

As amended on remand, the court's certification of the class included:

> All black applicants for employment and black employees of the Company's Mecklenburg County, North Carolina facility who have been adversely affected, at any time since July 27, 1971 (six months prior to Bennett's charge filed with the EEOC), by the Company's racially discriminatory employment practices involving promotions or hiring into Office and management positions, including Sales and foreman positions, and retaliation for having opposed discriminatory practices or having exercised rights protected under Title VII.

The district court found a pattern and practice of retaliation in violation of § 704(a). It also found that the complainants had demonstrated a pattern and practice of limiting black candidates to certain jobs, totally excluding them from supervisory and sales jobs, and treating them differently from white applicants and employees because of their race. It found that although black candidates were available and qualified for

sales and supervisory positions, and vacancies existed, Armour did not select them because of their race.

The findings with respect to class discrimination were based on evidence of specific instances of intentional discrimination and statistical evidence. The district court accepted plaintiffs' expert testimony that between 1965 and Drakeford's promotion in 1977 Armour brought in 37 supervisors. Twenty-seven were promoted from within and ten were new hires. Black persons constituted 25.11% of the outside available workforce, yet none was hired. As for sales, between 1965 and Ennis Graves's employment in August 1977, Armour promoted or hired 64 sales representatives. Plaintiffs' expert used the data on these employees to determine the qualifications expected of sales representatives. Between 1971 and the trial date, qualified black persons constituted 8.69% of the external and 20.71% of the

internal available workforce. Only one black person was hired as a sales representative despite 23 sales vacancies between 1971 and trial.[4]

Armour offered several explanations for these hiring patterns through one of its witnesses. The district court, however, refused to credit his testimony, finding that his admitted misrepresentations, decorum, and the conflicting documentary evidence made his testimony reliable. The court also noted nine instances in the record where Armour officials admitted the company had no explanation for its actions. Consequently, the district court held that plaintiffs had established a pattern and practice of discriminatory treatment towards members of the class.

Armour claims that the finding of classwide discrimination was unsupported. It asserts that the plaintiffs' statistical evidence was flawed and, without any statistical showing of underutilization, there

remained only "evidence of isolated instances" of discrimination.

First, we note that the complainants' testimony as to instances of discrimination establish more than isolated or "accidental" discriminatory acts. See Teamsters, 431 U.S. at 336, 97 S.Ct. at 1855. The testimony of both employees and company officials that the district court relied upon in concluding classwide and individual liability clearly established a pattern of intentional discrimination. For example, Harvey testified, without rebuttal from Armour, that she was informed by her manager that black people were not hired in sales because customers wouldn't buy from them. Also, Armour's practice of not posting sales or supervisory vacancies, and its practice of using a white managerial staff who relied on unwritten subjective criteria for making promotion decisions, support a finding of a pattern and practice of classwide

discrimination. Such evidence provides a substantial basis upon which a district court may infer that discrimination was the regular practice.

The district court rejected Armour's expert testimony that the sample of supervisors and sales representatives between 1971 and 1977 indicates no discrimination in the promoting or hiring of black employees.[5] It found that (1) the sample for the period was too small to establish a reliable statistical pattern; (2) Armour's availability data was based on a static work force of employees as of December 31, 1977, with no consideration of the qualifications or work experience of employees actually hired; and, (3) after evaluating the manner and decorum of both parties; expert witnesses, the plaintiffs' availability and utilization data was more reliable.

We find no error in the district court's decision to reject Armour's statistical

analysis and accept plaintiffs' expert testimony. Armour's argument that the district court improperly considered hiring data between 1965 and 1977 -- well before June 27, 1971, when the company's potential liability began to run -- might be persuasive if the company had virtually no vacancies in sales or supervisory positions between June 27, 1971, and March 4, 1977, when this suit was filed. It might then be argued that low turnover and a decrease in hiring account for the statistical disparities after 1971, rather than post-charge discrimination. The record shows, however, that there were 15 new vacancies in sales and 18 in supervisory positions during this period. The practices apparent before 1971 are consistent with the pattern during the relevant period.[6] No black persons were hired to fill these positions except for Drakeford, who was promoted four days before the suit was filed and one month after the commission issued him his right to

sue letter. Job offers made after learning of a charge "are entitled to little weight." EEOC v. Ford Motor Co., 645 F.2d 183, 197 (4th Cir. 1981), rev'd in part on other grounds, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982).[7]

Statistical proof in Title VII cases must be evaluated in light of "the surrounding facts and circumstances." Teamsters v. United States, 431 U.S. 324, 340, 97 S.Ct. 1843, 1857, 52 L.Ed.2d 396 (1977). As Justice Rehnquist made clear in a separate concurring opinion in Dothard v. Rawlinson, 433 U.S. 321, 338, 97 S.Ct. 2720, 2731, 53 L.Ed.2d 786 (1977): "It is for the District Court, in the first instance, to determine whether these statistics appear sufficiently probative of the ultimate fact in issue . . . . In making this determination, such statistics are to be considered in light of all other relevant facts and circumstances." In view of Armour's method of making promotion decisions during

the relevant period and the evidence of specific discriminatory acts, we cannot say that the district court was clearly erroneous in finding a pattern and practice of intentional discrimination against the class.

Similarly, because of Armour's pervasive harassment and retaliation against black employees who sought or achieved advancement or exercised rights protected by Title VII, we conclude that the district court's finding of a pattern and practice of retaliation is not clearly erroneous.

VII

In order to maintain a class action, the requirements of Federal Rule of Civil Procedure 23 must be met. General Telephone Co. v. Falcon, 457 U.S. 147, 156, 102 S.Ct. 2364, 2370, 72 L.Ed.2d 740 (1982); Stastny v. Southern Bell Tel. & Tel. Co., 628 F.2d 267, 273 (4th Cir. 1980). In reviewing the final

class certification, the appellate court views the entire record to determine if the trial court erred in its certification. Stastny, 628 F.2d at 276.

Armour claims that the class as certified fails to meet the prerequisites of commonality, typicality, numerosity, and adequacy of representation. The company further contends that the district court erred in including victims of retaliation and applicants, because they are inappropriate for class treatment.

Preliminarily, we note that inclusion of "office and management positions" in the certification comprises more jobs than are justified by the evidence. While it is true that sales jobs are included in office positions and supervisory jobs may be considered management positions, the broad reference to office and management positions encompasses jobs for which no plaintiff or intervenor presented evidence of racially

discriminatory practices. To clarify the certification, it must be amended to include only promotions into sales and supervisory positions.

Armour's contention that the district court erred in certifying outside applicants for sales and supervisory positions when the class representatives were employees who sought promotions into these jobs presents a more difficult question. In General Telephone Co. v. Falcon, 457 U.S. 147, 157-58, 102 S.Ct. 2364, 2370-71, 72 L.Ed.2d 740 (1982), the Supreme Court rejected the practice of across the board certification and held that the class claims must be fairly encompassed within the representatives' claims. Falcon noted that the commonality and typicality requirements of rule 23(a) might be satisfied if there were "[s]ignificant proof that an employer operated under a general policy of discrimination" and "the discrimination manifested itself in hiring and promotion in

the same general fashion, such as through entirely subjective decisionmaking processes." 457 U.S. at 159 n. 15, 102 S.Ct. at 2371 n. 15.

Applying Falcon, the district court found that the standards for selection to these positions are the same for incumbent employees and outside applicants. At trial, Armour officials testified that employees and outside applicants were required to complete an application for employment and that employees were given no preference over others. Also, entirely subjective criteria were applied to employees and outside applicants seeking sales or supervisory jobs.

The plaintiffs' claims regarding the promotion of black employees into sales and supervisory jobs and class claims regarding the hiring of black applicants into these jobs overlap on many important issues of proof. We believe, however, that there is a significant omission in the district court's findings.

Applying Falcon, we are unable to affirm single class treatment for both promotions and hiring claims because the district court made no finding that the supervisors who made the challenged promotions decisions were the same persons who made hiring decision. Consequently, there is no evidence that the officials who selected outside applicants for the sale and supervisory jobs were motivated by racial prejudice. See Falcon, 457 U.S. 147, 162, 102 S.Ct. 2364, 2373, 72 L.Ed.2d 740 (Burger, C.J., concurring in part, dissenting in part). Although the certification question is a close one, we conclude that the significant proof for single class treatment required by Falcon is lacking in this case, and thus the plaintiffs cannot adequately represent the outside applicants for sales and supervisory positions. Additionally, we note that the lack of identity of officials who were responsible for hiring undercuts a finding that the company engaged in a pattern

and practice of racial discrimination against outside applicants. See Lilly v. Harris-Teeter Supermarket, 720 F.2d 326, 338 (4th CIr. 1983). This observation, however, in no way affects the proof of a pattern and practice of discrimination against incumbent employees who sought a promotion into sales and supervisory positions.

In all other respects, we conclude that the record supports the district court's determination of class action status. The plaintiffs' pleadings and evidence are consistent with a finding of commonality. Both class claims and individual claims were established by a showing of intentional discrimination in promotions, bolstered by statistical evidence.

We cannot accept Armour's contention that harassment and retaliation claims are not susceptible of class treatment because they are too individualized. The plaintiffs established a general practice of retaliation

against employees who opposed discriminatory practices or exercised rights protected under Title VII, in violation of § 704(a). Despite the presence of individual factual questions, the commonality criterion of rule 23(a) is satisfied by the common questions of law presented. In this case, the utility of the class action device would be destroyed by requiring the plaintiffs to bring separate claims of retaliation. See Int'l Woodworkers v. Chesapeake Bay Plywood, 659 F.2d 1259, 1269-70 (4th Cir. 1981); 7 Wright and Miller, Federal Practice and Procedure § 1763 (1972 and Supp. 1983).

The complainants' claims are typical of the plant-wide discriminatory practices they challenge. Drakeford and Harvey were discriminatorily denied sales positions. Drakeford and Edwards were discriminatorily denied supervisory positions. Drakeford and Edwards were discriminatorily denied supervisory positions. Finally, Holsey,

Frazier, Drakeford, and Bennett[8] were found to have been victims of retaliation for exercising their rights under Title VII. Thus, at least one representative is a qualified member of the class of employees denied promotions in sales and supervisory positions and subjected to retaliation. See 7 Wright and Miller, Federal Practice and Procedure § 1761 at 586-87 (1972). The complainants alleged and established that they personally were harmed by these practices. They meet the typicality criterion of rule 23(a) and the requirement for fair and adequate representation.[9]

The final requirement for certification, numerosity, was satisfied by the plaintiffs. The district court found that Armour employed between 46 and 60 black employees annually since 1971, and this large number of employees potentially affected by Armour's challenged practices made joinder impracticable. Armour contests the figures used by the district

court, claiming that the relevant number is the total of all supervisory and sales vacancies during the time period, which is 34. Armour further contends that the more realistic figure is 6 or 7, because of the 34 vacancies only 6 or 7 positions might have been awarded to blacks if the availability data used at trial applied.

We cannot accept this method of estimating the size of a class for purposes of rule 23(a)(1). Contrary to Armour's assertion, this court's opinion in Kelley v. Norfolk & Western Ry., 584 F.2d 34 (4th Cir. 1978), does not mandate Armour's computation. Kelley involved complaints of a promotion system at a facility where there were 67 black employees, all lived in the same area, and the plaintiffs identified only 8 black employees who qualified for promotion. In the instant case, there were considerably more black employees who could have been injured by the challenged practices, and their identity could

not be established at the liability stage. Moreover, Kelley establishes that there is no mechanical test for numerosity and the determination "turns on the nature of the claim of discrimination asserted by the plaintiffs and the number of persons who could have been injured by such discrimination." 584 F.2d at 35. See generally 7 Wright & Miller, Federal Practice and Procedure § 1762 at 602-03 (1972). The determination of numerosity is a discretionary matter, and, finding no abuse, we affirm the district court's decision. See Cypress v. Newport News General & Nonsectarian Hosp. Ass'n, 375 F.2d 648, 653 (4th Cir. 1967).

VIII

Armour objects to allowing Holsey and Frazier to establish permanent seniority in the sausage department, and using their date of hire as their departmental seniority date.

It also protests that the judgment contains unreasonably vague injunctive relief, contrary to the requirements of Federal Rule of Civil Procedure 65(d).

We conclude that retroactive seniority is the appropriate remedy to be awarded to Holsey and Frazier. See Franks v. Bowman Transp. Co., Inc., 424 U.S. 747, 762-70, 96 S.Ct. 1251, 1263-66, 47 L.Ed.2d 444 (1976). The record, however, does not support using their date of hire as their departmental seniority date. Under the terms of the collective bargaining contract, if Armour had allowed them to bump into sausage, they would have had departmental seniority dating from their transfer. The relief accorded Holsey and Frazier should be modified to this extent.

The court has the duty to render a decree which will eliminate racially discriminatory effects of the past and bar such discrimination in the future. Albemarle Paper Co. v. Moody, 422 U.S. 405, 418, 95 S.Ct.

2362, 2372, 45 L.Ed.2d 280 (1975); Sledge v. J. P. Stevens & Co., Inc., 585 F.2d 625, 643-44 (4th Cir. 1978). The district court properly fashioned injunctive relief to protect the plaintiffs and class members from future discriminatory and retaliatory acts like those established at trial. It drafted the decree with sufficient specificity to give Armour fair notice of the conduct that is being prohibited. We note, however, that because the court's finding of classwide discrimination against outside applicants lacks evidentiary support, that portion of the judgment enjoining Armour from discriminating in hiring is vacated.

IX

Because we have vacated part of the judgment, the district court must reconsider the award of attorneys' fees. We therefore vacate the award and remand this issue for a

determination of the proper amount in accordance with Hensley v. Eckerhart, 461 U.S. 424, 103 S.Ct. 1933, 76 L.Ed.2d 40 (1983), and Blum v. Stenson, ___ U.S. ___, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). The award should include a reasonable fee for the appellees' attorneys on appeal with respect to those issues on which the judgment has been affirmed. Because appellees have substantially prevailed on appeal, they shall recover their costs.

The judgment is affirmed in part, vacated in part, and the case is remanded for further proceedings consistent with this opinion.

FOOTNOTES

[1] The agreements do not cover office employees (including sales), supervisors, or probationary employees.

[2] The district court ruled that Frazier was not discriminatorily denied bumping rights in 1973 because he had not yet established sufficient seniority. Frazier also failed to prove his claim that Armour discriminatorily denied him a promotion into sales.

[3] The parties and the court used the terms "foreman" and "supervisors" interchangeably.

[4] The district court rejected Armour's contention that Virginia Davis, a black female employee who worked in the sales office as a telephone clerk between December 1976 and February 1977, was the first black employee with sales duties. Relying on the testimony of an Armour official that the first black sales representative was hired in August 1977, the district court found that Davis had only clerical duties.

[5] Armour's expert testified that the underrepresentation of black employees in sales and supervisory positions came within one standard deviation, an acceptable margin of disparity. This is only true, however, if promotions and hires made after commencement of this action are included. We find no error in the fact that the district court minimized the significance of evidence of Armour's postcomplaint hiring and promotion of black employees.

See EEOC v. Ford Motor Co., 645 F.2d 183, 197 (4th Cir. 1981), rev'd in part on other grounds, 458 U.S. 219, 102 S.Ct. 3057, 73 L.Ed.2d 721 (1982); Rich v. Martin Marietta Corp., 522 F.2d 333, 346 (10th Cir. 1975).

6 Moreover, because the evidence shows there was little change in Armour's employment practices being challenged, the precharge statistical evidence is relevant. See Hazelwood School Dist. v. United States, 433 U.S. 299, 309 n. 15, 97 S.Ct. 2736, 2742 n. 15, 53 L.Ed.2d 768 (1977).

7 After this action was filed, Armour promoted a black employee to supervisor and hired a black person as a salesman.

8 Armour asserts that Bennett is not an adequate representative of the class because she had limited exposure to Armour as a probationary employee for six months and then was discharged. This reasoning would create the anomalous result that an employer could eliminate a potential representative of employees merely by discharging a complaining employee. We therefore reject this argument.

9 Armour does not contend that plaintiffs' counsel were inadequate representatives. Thus, this aspect of rule 23(a)(4) is not at issue.

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 83-1428

Curtis Holsey, Jackie L. Drakeford,
Julius Frazier, Mynell Bennett,
Linwood Edwards, Laura Harvey,
Janie Hill,

Appellees,

versus

Armour & Company,

Appellant.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte, James B. McMillan, District Judge.

Upon consideration of the appellant's petition for rehearing,

IT IS ORDERED that the petition for rehearing is denied.

Entered at the direction of Judge Butzner for a panel consisting of Judge Ervin, Judge Chapman and Judge Butzner.

For the Court,

CLERK

§ 1981. Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

¶ 2000e-2. Unlawful employment practices

Employer practices

(a) It shall be an unlawful employment practice for an employer --

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate,or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

Employment agency practices

(b) It shall be an unlawful employment practice for an employment agency to fail or refuse to refer for employment, or otherwise discriminate against, any individual because of his race, color, religion, sex, or national origin, or to classify or refer for employment any individual on the basis of his race, color, religion, sex, or national origin.

Labor organization practices

(c) It shall be an unlawful employment practice for a labor organization --

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in anyway which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin; or

(3) to cause or attempt to cause an employer to discriminate against an individual in violation of this section.

§ 200e-3. Other unlawful employment practices

Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

(a) It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

Rule 23. Class Actions

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual

members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affectin only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of th

controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and

specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) and action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all

of the members as any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1123

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

ARMOUR & COMPANY,

Petitioner,

v.

CURTIS HOLSLY, JACKIE DRAKEFORD, JULIUS FRAZIER, MYNELL BENNETT, JANNIE HILL, LAURA HARVEY, LINWOOD EDWARDS, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the district court abuse its "judicial administration" discretion under Cooper v. Federal Reserve Bank, ___ U.S. ____ (1984), in ruling on claims fully litigated at trial?

2. Did the district court abuse its discretion in certifying the class?

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Statement of the Case

On March 4, 1977 Curtis Holsey, Jackie Drakeford and Julius Frazier instituted this action against Armour & Company and the United Food and Commercial Workers International Union alleging that Armour and the Union had engaged in certain racially discriminatory employment practices affecting the plaintiffs and a class of employees and applicants for employment in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e et seq. and 42 U.S.C. §1981.[1/] Holsey, Frazier and Drakeford had previously filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC) on March 7, 1974. On June 2, 1977, Mynell Bennett was allowed to intervene in the proceeding as a named plaintiff, following receipt of a right to sue letter based

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1/ The claims against the union were dismissed and are not at issue here.

on an EEOC charge she had filed on January 27, 1972. Bennett's charge alleged and the EEOC stated, among other conclusions, that the Company maintained segregated job classifications in failing to hire or promote blacks into numerous supervisory and sales jobs. (A. 110, 169-70)

On May 1, 1979, the district court conditionally certified the class to include black applicants for employment and employees at petitioner's Mecklenburg, North Carolina facility who had been affected by certain discriminatory employment practices. (A. 162) At trial plaintiffs presented evidence that they and their class, as well as intervenor Bennett and plaintiff class members Harvey, Hill and Edwards, had personally suffered from defendant's pattern of discrimination in promotions to supervisory or sales jobs, and that Armour had harassed and retaliated against complaining black employees.

Armour had ample opportunity to put on whatever evidence it saw fit to rebut these claims, and introduced testimonial and documentary evidence opposing the contentions of each of the seven individual claimants. (A. 228) At no time prior to the district court's ruling on the merits of the individual claims did Armour raise any objection to the lower court's adjudication of all litigated claims.

After trial, but before Judgment, the district court allowed the three plaintiff class members to formally intervene as named representatives. Subsequently, the district court entered its Findings of Fact and Conclusions of Law. (A. 1-97)

On appeal, a divided panel of the Fourth Circuit vacated the judgment and remanded for reconsideration of the findings of fact and conclusions

of law, and to consider the intervening decision of Texas Dept. of Community Affairs v. Burdine, 450 U.S. 248 (1981). While the case was pending in the district court, General Telephone Co. v. Falcon, 457 U.S. 147 (1982), was issued. The district court thereupon modified the class definition but otherwise substantially reaffirmed its earlier findings of discrimination.

The district court found that the Company had discriminatorily denied Holsey and Frazier bumping rights in layoffs of hourly laborers. The Court also found that Drakeford and Harvey were discriminatorily denied promotion to sales jobs; that Drakeford, Edwards and Harvey were discriminatorily denied promotion to foremen jobs; and that Bennett was denied appointment or promotion to a permanent job because of retaliation and race. The lower court cited

numerous instances in which plaintiffs and class members had been harassed and retaliated against because of their complaints about discrimination. The district court concluded that Armour had engaged in a pattern and practice of discriminatorily refusing blacks promotions to sales and supervisory jobs, and had engaged in a "consistent practice" of retaliating against blacks who complained. (A. 189) The district court also found that more than 40 to 60 black employees annually had been affected by the pattern of discrimination. (A. 163) For example, although employing more than 100 persons in sales or supervisory capacities between 1965 and 1977, the district court found that the Company failed to hire a single black in those jobs until August 1, 1977. (A. 150, 153) Harvey was told not to bother applying because the Company did not hire blacks

in sales. (A. 147) When minorities protested discrimination, the Company consistently retaliated against them, going so far as deny one employee his right to file a grievance, and threatening him that if he went to the EEOC he'd "better win." (A. 12-13; Tr. 365)

From these findings, Armour appealed a second time, and a unanimous panel of the Fourth Circuit affirmed in substantial part. (A. 217-84) However, the panel modified the promotion class in light of Falcon to exclude nonemployee applicants, and positions other than sales or supervisory slots. (A. 272-75) The court of appeals further concluded that petitioner had "full opportunity" to defend the individual claims, and had not demonstrated any prejudice from the post-trial intervention of the testifying class members. (A. 227-29)

REASONS FOR DENYING THE WRIT

This case involves the routine exercise by a district court of its judicial administration and fact-finding functions, and the familiar application of this Court's precedents. The petitioner raises issues which have not been properly presented to the lower courts. Moreover, the issues raised involve no conflicts with decisions of this Court or other courts of appeal. Therefore review by this Court is unwarranted.

I. The Lower Courts' Decision Refusing Petitioner's Request to Relitigate Claims That Had Been Fully Litigated at Trial is Consistent With Cooper v. Federal Reserve Bank.

Petitioner's argument that the lower courts erred in adjudicating the plaintiffs' and the three intervenors' claims that were fully litigated ignores this Court's decision in Cooper v. Federal Reserve Bank, ___U.S.___, 104 S.Ct. 2794 (1984). Cooper held that "[w]hether the

issues framed by the named plaintiffs before the [trial] court should be expanded to encompass the individual claims of additional class members is a matter of judicial administration that should be decided in the first instance by the district court." 104 S.Ct. at 2802. (emphasis added)

Here, in exercising its administrative discretion the district court held full hearings on the three plaintiff class members' claims, as well as the claims of the named plaintiffs and intervenor. As noted by the appeals court, petitioner was aware of these claims, had "full opportunity" to present rebuttal evidence, and in fact "introduced evidence in opposition to them." (A. 228) At no point has Armour claimed it had additional evidence to present on the individuals' claims. Moreover, petitioner registered no objection at trial to this procedure, nor at any time until after

the lower court issued its ruling on the merits of the claims. Indeed, as noted by the court below (A. 228), it is difficult to see how petitioner was harmed since plaintiffs met the more rigorous Burdine burden of proof than that required in Stage II proceedings pursuant to United States v. Teamsters, 431 U.S. 324 (1977) in which defendant bears the burden of proof.

In summary, petitioner had full opportunity to defend against the claims, it failed to object prior to decision on the merits to the procedure followed by the district court; no conflict among any circuits has been shown;[2/] and the lower courts'

2/ Petitioner cites another decision from the same circuit as the opinion below, Sledge v. J.P. Stevens, 585 F.2d 625 (4th Cir. 1978), which the appeals court distinguished. The court of appeals concluded that Sledge is not in conflict, since Sledge dealt with a class member who "was led to believe that he would [not] be expected

(Footnote 2 continued)

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decision falls squarely within Cooper's holding concerning a district court's ministerial function.

II. The Class Certification Issues Do Not Warrant Review.

The class certification issues raised by petitioner involved a fact-intensive investigation by the district court into the nature of the claims. Both lower courts modified the class definition in compliance with Falcon's guidelines, and petitioner has shown no conflict with decisions of other courts of appeals. One of petitioner's issues was not even timely presented to the lower courts.

2/(cont'd) to prove" his case until a later stage of the proceeding. 585 F.2d at 637-38. (See A. 229) In contrast, petitioner here "had a full opportunity to defend against the intervenors' claims, and it introduced evidence in opposition to them." (A. 228)

Review of the district courts' findings of fact regarding numerosity is unwarranted. The district court found that [m]ore than forty to sixty black employees of the Company annually . . . have been affected by the Company's practices" (A. 163 (emphasis added)) during the nine years prior to trial. While there exists some overlap from year to year, the lower courts found as a fact that joinder of such large numbers of employees was impractical. As petitioner has not even cited any case from this Court or other courts of appeal which purport to be in conflict,[3/] review of these findings is not justified.

3/ Armour cites no decisions of this Court or of any sister circuits which are in conflict with the result below, and respondents are unaware of any lower court decisions holding that, as a matter of law, the scores of black employees such as those injured by the defendant's practices are not sufficiently numerous to warrant class treatment. Finding no conflict with other circuits, petitioner cites a purported

(Footnote 3/ cont'd)

Armour also asks this Court to adopt a rule of law stating that an employer's consistent pattern of retaliation against complaining black employees may never be challenged in a class action, even where, as here, the lower courts find that the employer adopted a "pervasive" and "consistent" practice of harassing every black employee who complained of discrimination. (See A. 189, 270) However, as noted by the courts below, there is no precedent for arbitrarily forbidding class treatment of such common issues of fact and law pursuant to the provisions of Rule 23.

3/ (cont'd) conflict with an earlier decision in the same circuit. However, the lower court specifically explained why Kelley v. Norfolk & Western Ry., 584 F.2d 34 (4th Cir. 1978), was inopposite (See A. 277-79). Review by this Court is unwarranted merely to assist the court of appeals in harmonizing two of its own decisions.

The dictum in Patterson v. General Motors Corp., 631 F.2d 476 (7th Cir. 1980) is not in conflict with the decisions below. Patterson affirmed a district court's denial of class certification since "plaintiff's action [met] none of the requirements of Rule 23(a)." 631 F.2d at 482 (emphasis in original). Indeed, the Patterson plaintiff complained "solely" of his "personal grievances," and he never "indicated that any other employee has ever been discriminated against in the same way or that there is the likelihood of such a future class ever existing." Id. In summary, the Patterson plaintiff had failed to meet any of the Rule 23(a) requirements of demonstrating impracticality of joinder, typicality, commonality, and adequacy of representation. Id. at 480-81. Such factual distinctions between

Patterson and the case at hand would render review of such a purported "conflict" meaningless.

Finally, Armour contends that the lower courts erred in utilizing Bennett's EEOC charge to determine the starting point of class liability, despite the fact that Bennett's charge raised all the class issues and was the earliest of the various EEOC charges. However, Armour failed to raise this issue in either the district court or in either of its two appeals to the court of appeals. Indeed, this issue first appeared in Armour's Petition for Rehearing in the Court of Appeals after the second appeal. Review should therefore be denied as no lower court has had the opportunity to even consider Armour's contention.

In any event, the approach followed here is consistent with

Albemarle Paper Co. v. Moody, 422 U.S. 405, 414 n.8 (1975), which reaffirmed the principle that plaintiff class members seeking back pay may rely on the EEOC charge of another plaintiff or class member, and by the standard practice in the circuits holding that Title VII's exhaustion requirement is satisfied if the EEOC charge on which the class action is based raises issues "like or related" to those actually litigated. See, e.g., Sanchez v. Standard Brands, 431 F.2d 455 (5th Cir. 1970); EEOC v. General Electric, 532 F.2d 339 (4th Cir. 1976). The district court found that Bennett's charge clearly raised such issues. (A. 110, 169-70) As the petitioner has cited no conflict among the circuits in approaches to this matter, review is not warranted.

Armour's argument that the lower courts here failed to follow General

Telephone Co. of the Southwest v. Falcon, 457 U.S. 147 (1982), ignores the extensive discussion of Falcon in the opinions of both courts below. (A. 166-69; 270-75) Indeed the court of appeals expressly relied on Falcon in excluding applicants from the class.

Armour also makes errors of fact when it argues that Bennett may not represent her fellow employees. The lower courts found that Bennett was an employee who was denied appointment or promotion to a permanent job and retaliatorily discharged when she complained. The lower courts concluded that she, as well as Holsey, Drakeford, Frazier, Harvey, Hill and Edwards were together appropriate class representatives and together satisfied the Rule 23 representational requirements. (A. 276-77)

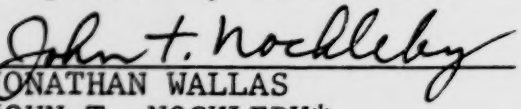
Determining who may appropriately represent a class of black employees requires delving into the particular facts of the putative representatives' claims. Here the lower courts properly exercised their discretion in a routine application of Falcon. The approach followed below is consistent with Falcon and sister circuits, and this court need not waste its time repeating the highly fact-specific inquiry already scrupulously undertaken by these lower courts.

Conclusion

The petition for a writ of certiorari should be denied.

This 12th day of February, 1985.

Respectfully submitted,



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